Supreme Court, U.S.
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No. _____

IN THE
Supreme Court of the United States

October Term, 1998

In Re SCOTT E. STAFNE

On Petition for Writ of Mandamus To the United States Court of Appeal for the Ninth Circuit

PETITION FOR WRIT OF MANDAMUS

SCOTT E. STAFNE, *pro se*
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10 7 P

This Court has held that "the right of oral argument as a matter of due process varies from case to case in accordance with differing circumstances...." *Federal Communications Comm'n v WJR*, 337 U.S. 265, 276 (1949). *See also Londoner v Denver*, 210 U.S. 373, 385 (1908). FRAP 34(a) provides that "oral argument shall be held in all cases unless pursuant to a local rule" certain criteria are met. The petitioner (Stafne) alleged the ninth circuit court of appeals had instituted General Orders and procedures which were facially inconsistent with FRAP 34 (a) and violated Article III, and the First and Fifth Amendments to the United States Constitution. Stafne moved the court of appeals "to change its screening procedures in such a way as to conform to" the United States Constitution and FRAP 34. The court of appeals denied Stafne's motion without providing any reasons supporting its denial and prohibited Stafne from moving for reconsideration of its unreasoned decision and order.

ISSUE PRESENTED FOR REVIEW

Should this Court issue a supervisory writ of mandamus requiring the court of appeals for the ninth circuit to issue a written decision responding to the substantive merits of a motion challenging the court of appeals' jurisdiction and authority to promulgate and institute General Orders and procedures relating to oral argument alleged to be inconsistent with Article III, the First Amendment, The Fifth Amendment, and FRAP 34(a)?

PERSONS AGAINST WHOM RELIEF IS SOUGHT

Relief is sought against the Honorable Judges of the United States Court of Appeals for the Ninth Circuit. Their function is to exercise Article III judicial power consistent with the provisions of the United States Constitution and the laws of the United States.

PARTIES TO THE UNDERLYING ACTION

The parties to the underlying action include the petitioner, Scott E. Stafne[1] and Michael Failla (plaintiff-appellants) and William McTurnal, Janet McTurnal, and the marital community composed thereof, (defendants-appellees).

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[1] Although appearing pro se. Stafne has been admitted to practice before this Court since October 1. 1984.

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PETITION FOR WRIT OF MANDAMUS

Scott E. Stafne respectfully petitions for a writ of mandamus directing the United State Court of Appeals for the Ninth Circuit to issue a "reviewable" written decision setting forth its substantive reasoning and legal authority for denying Stafne's motion challenging the ninth circuit's jurisdiction and authority to promulgate and institute General Orders and procedures alleged to be inconsistent with Article III, the First Amendment, the Fifth Amendment, and FRAP 34(a).

CITATION OF OPINIONS

So far as petitioner is aware, there are no citations to any orders entered with regard to this case.

OPINIONS BELOW

The order sought to be reviewed is the Court of Appeals denial of "Stafne's Objection to [the Ninth] Circuit's Oral Argument Screening Procedures and Motions related thereto" and "Stafne's Supplemental Motions Relating to Stafne's Previously filed 'Objection to ... [the Ninth] Circuit's Oral Argument Screening Procedures and Motions Relating thereto'". This order is included in Appendix A, at pages A1 – A2. Also included in the Appendix, but not specifically related to the issue involved in this Petition, is a Memorandum Opinion of the Court of Appeals affirming the district court's order dismissing Stafne's appeal. *See* Appendix B, at pages A3 – A4.

JURISDICTION

The challenged order was filed on April 29, 1998. It specifically stated: "No motions for reconsideration will be filed or entertained". Accordingly, no motion for reconsideration could be filed. As will be shown, this Court has jurisdiction to review the legal and Constitutional appropriateness of the ninth circuit's order under the All Writs Act, 28 U.S.C. 1651(a).

CONSTITUTIONAL PROVISIONS INVOLVED

Article III provides in relevant part as follows:

Section. 1. The judicial Power of the United States, shall be vested in one supreme Court, and in such inferior Courts as the Congress may from time to time ordain and establish. The Judges, both of the supreme and inferior Courts, shall hold their Offices during good Behaviour, and shall, at stated Times, receive for their Services, a Compensation, which shall not be diminished during their Continuation in Office.

Section. 2. ***The judicial Power shall extend to all Cases, in Law and Equity, arising under this Constitution, the Laws of the United States, and Treaties made, or which shall be made, under their Authority***: -- to all Cases affecting Ambassadors, other public Ministers and Consuls; -- to all Cases of admiralty and maritime Jurisdiction; -- to Controversies to which the United States shall be a Party; -- to Controversies between two or more States; -- between a State and citizens of another State; -- between Citizens of the same State claiming Lands under Grants of

different States, and between a State, or the Citizens thereof, and foreign States, Citizens or Subjects.

In all cases affecting Ambassadors, other public Ministers and Consuls, and those in which a State shall be a party, the Supreme Court shall have original Jurisdiction. ***In all other cases before mentioned, the supreme Court shall have appellate Jurisdiction both as to Law and Fact, with such Exceptions, and under such Regulations as Congress shall make.*** ... [Emphasis Supplied]

STATUTES INVOLVED

28 U.S.C. 1651(a) provides:

The Supreme Court and all courts established by Act of Congress may issue all writs necessary or appropriate in aid of their respective jurisdictions and agreeable to the usages and principles of law.

RELIEF IS NOT AVAILABLE IN ANY OTHER COURT

The instant petition for mandamus requests this Court order the Ninth Circuit Court of Appeals to issue a judicially reviewable decision (*i.e.* a decision which contains a reasoned analysis supported by appropriate legal authority) stating why it rejected Stafne's challenges to that court's jurisdiction and Constitutional authority to promulgate and implement General Orders and procedures alleged to be inconsistent with Article III, the First Amendment, The Fifth Amendment, and

FRAP 34(a)[2]. Stafne has been expressly prohibited from seeking such relief from the Court of Appeals because its order specifically states: "No motions for reconsideration will be filed or entertained". Appendix A, A2.

STATEMENT OF THE CASE

The district court had jurisdiction of the underlying case pursuant to 18 U.S.C. 1964. An appeal followed the district court's dismissal of Stafne's complaint with prejudice.

On January 6, 1998 Stafne received a letter indicating a screening panel of ninth circuit judges had determined pursuant to FRAP 34(a) and 9th Cir. R. 34-4 that his case should be submitted without oral argument. Appendix C, Exhibit 1, A18 – A19. Stafne filed a timely statement explaining that he was entitled to oral argument under FRAP 34(a) because 1.) his central contention was that the Supreme Court had overruled the ninth circuit authority which the district court had relied upon for dismissing his case; 2.) the ninth circuit had not considered this issue; and 3.) the circuits that had considered similar issues had reached differing results. *See* Appendix C, A20 – A27.

After filing his motion Stafne wrote a letter to the Honorable Chief Judge Proctor Hug on January 30, 1998 requesting further information about the ninth

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[2] The Court of Appeals bald denial of Stafne's objection and motions to its subject matter jurisdiction and Constitutional authority to promulgate the challenged General Orders and procedures does not set forth any reasons or legal authority for justifying it's order.

circuit's screening procedures. Appendix C, Exhibit 5, A33 - A3. On February 5, 1998 Molly C. Dwyer, a ninth circuit clerk and staff attorney, responded for the court and explained the ninth circuit's oral argument screening procedures. Appendix C, Exhibit 6, A37 – A39. Based on that response, Stafne filed "Objections" to the 9th circuit's screening procedures which alleged 1.) the procedures unconstitutionally delegated Article III responsibilities to staff attorneys; and 2.) violated due process. Appendix C, A5 – A39. Stafne moved the court to change its screening procedures to conform to Article III, the due process clause, and the language of FRAP 34(a) and Ninth Cir. R. 34-4. Appendix C, A5 – A6, A17.

After the "objections" were filed, Ms. Dwyer sent Stafne a copy of the ninth circuit's General Orders. Stafne also had additional conversations with court staff personnel who clearly indicated that factors not included within 9th Cir. 34-4 were being routinely considered in determining whether a case should be set for oral argument[3]. Appendix E, A68 – A76. Based on

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[3] The statements by ninth circuit staff personnel that undisclosed criteria are used as a part of the ninth circuits oral argument screening procedures are corraborated by the provisions of the circuit's General Orders which establish an undisclosed "weighing process" which is used to place cases on the various screening calendars. App. pp. 44 – 45 and note 3 on p. 45. The use of such undisclosed factors is facially inconsistent with FRAP 34(a) which states: "A general statement of the criteria employed in the administration of such local rule shall be published in or with the rule...." and therefore is tantamount to the ninth circuit violating a federal statute. *Sibbach v. Wilson & Co., Inc.*, 312 U.S. 1. 13 (1940). ("[A] rule [of procedure]..., if

his conversations with court personnel and his review of the General Orders Stafne filed "supplemental objections" alleging that the ninth circuit's screening procedures 1.) were facially inconsistent with FRAP 34(a) and therefore illegal; 2.) frustrated meaningful appellate review by the Supreme Court of ninth circuit court of appeal decisions with regard to oral argument and therefore violated Article III; and 3.) created a closed and unfair system which violated the First and Fifth Amendments to the United States Constitution. Appendix E, A42 - A76.

After his memorandum in support of the supplemental objections had been prepared, but prior to its filing, the court of appeals placed Stafne's case on the oral argument calendar. Appendix D, A40. Stafne nonetheless filed his "supplemental objections" noting that the relief he had moved for requested the court of appeals "to change its screening procedures in such a way as to conform to" the United States Constitution and FRAP 34". Appendix E, A43. Stafne further argued that because he was challenging the court of appeals' subject matter jurisdiction and Constitutional authority to enact the challenged General Orders and procedures the arguments could be raised by "anyone at any time" regardless of the fact that he had been belatedly granted oral argument. *Mansfield Coldwater & Lake Michigan Railway Company v. Swan*, 111 U.S. 379 (1884.) App. p. 40 – 41. Stafne also claimed that granting him oral argument did not make the issues

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within the power delegated to this court, has the force of a federal statute.")

moot as they were capable of repetition, yet evading review[4]. Appendix E, A 41.

On April 29, 1998 a three judge panel denied Stafne's motions without citation to any legal authority or any substantive analysis of Stafne's claims that the court was acting unconstitutionally and in violation of law. App. p. 1. The order further stated: "No motions for reconsideration will be filed or entertained." Appendix A, p 2.

On August 6, 1998 the Ninth Circuit issued a one page Memorandum Opinion affirming the district court's dismissal with prejudice. Appendix B, A3 – A4. Stafne intends to seek appellate review by this Court of that decision ***and*** the court of appeals' decision with regard to his "objections" and motions regarding the ninth circuit's oral argument screening procedures. To that end Stafne has presented a Petition for Rehearing (Appendix F, A77 – A86) to the court of appeals asking it to address Supreme Court authority relevant to its

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[4] Logically, the "capable of evading review" analysis should apply with its greatest force to situations, like this one, where the jurisdiction and Constitutionality of a court's procedures are being challenged. Otherwise, a court could always simply grant the requested relief when someone mounts a Constitutional attack on its procedures, then claim the issue is moot, and thus forever prevent any substantive challenge to the constitutionality and legality of its actions.

Memorandum Opinion in such a manner that its reasoning can be meaningfully reviewed by this Court[5]. Appendix E, A83- 86. However, Stafne has no similar remedy available to him with regard to his Constitutional challenges to the ninth circuit's oral argument screening procedures as he has been expressly prohibited by the court of appeals from filing any motion for reconsideration. Thus, the only way Stafne can obtain a "reviewable" decision regarding his Constitutional challenges to the ninth circuit's oral screening process is by way of writ from this court pursuant to 28 U.S.C. 1651(a).

Accordingly, Stafne now petitions this Court for a writ of mandamus ordering the court of appeals to produce a written decision considering the substantive merits of his claims which can be meaningfully reviewed by this Court. Stafne also petitions this Court

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[5] For some unexplained reason the court of appeals appears unwilling to consider and analyze controlling Supreme Court authority in this case. For example, in summarily affirming dismissal of Stafne's motion for sanctions based on misrepresentations in the other parties' memoranda, the court of appeals held (without citation to any authority) that Stafne's request for sanctions was "derivative of his substantive claims, and therefore were properly dismissed therewith." Appendix B, A4. But this Court has clearly held that sanctions issues are collateral and not appropriately dismissed as being derivative. *Willy v. Coastal Corporation*, 503 U.S. 101 (1992); *Cooter & Gell v. Hartmarx Corp.*, 496 U.S. 384 (1990). Similarly, notwithstanding abundant evidence in the record relevant to the "closed ended continuity" test for a RICO pattern established by this Court in *H.J., Inc. v. Northwestern Bell Tel. Co.*, 492 U.S. 229 (1989) the court of appeals has inappropriately refused to consider the effect of this controlling Supreme Court authority on its own earlier precedent. Appendix F. A78 –A80, A83 - A86.

for the issuance of such a writ pursuant to 28 USC 1651(a) because this Court has a "special obligation" under the Constitution to insure that all inferior courts are acting within the limits of judicial power as set forth in the Constitution and duly enacted laws of the United States.

REASONS FOR GRANTING THE MOTION

1.) THE COURT OF APPEALS REFUSAL TO PROVIDE A DECISION WHICH CAN BE MEANINGFULLY REVIEWED BY THIS COURT VIOLATES STAFNE'S PERSONAL ATRICLE III RIGHTS.

Stafne's challenges to the ninth circuit's General Orders and procedures regarding oral argument pursuant to FRAP 34 arise under the Constitution and laws of the United States. Article III, Section 2 vests "appellate Jurisdiction, both as to Law and Fact" of Stafne's Constitutional claims in the Supreme Court. Stafne has a personal Article III right to an independent and impartial appellate review of his claims that the ninth circuit has exceeded its Constitutional authority. *Commodities Futures Trading Comm'n v Schor*, 478 U.S. 833, 848 (1986) In that case, this Court noted:

> Article III's "guarantee of an independent and impartial adjudication of matters within the judicial power ... serves to protect personal, rather than structural, interests."

Meaningful appellate review requires an inferior court to explain the basis for those decisions subject to review by a higher court. *See e.g. Vandino v. A. Valey Engineers*, 903 F. 2d 253 (3rd Cir. 1990) (Third circuit exercises inherent supervisory authority requiring district courts to provide explanations for their orders so as to assist circuit court in performing appellate review.) In so holding, the third circuit court of appeals stated:

> "[T]he failure to ... [provide reasoning] in a non-frivolous case makes it extremely difficult, and perhaps impossible, for an appellate court ... to effectively grant appellate review.") *Id.* p. 258.

By not providing an explanation for rejecting Stafne's substantive challenge to it's authority the court of appeals has made it "extremely difficult, if not impossible" for this Court to conduct an appellate review of Stafne's claims. This frustrates Stafne's Article III rights to an independent and impartial appellate review by this Court. Accordingly, Stafne urges this Court utilize 28 U.S.C. 1651(a) to require the court of appeals to address the substantive issues involved because such an order is "necessary" and "appropriate in aid" of this Court's appellate jurisdiction to review the court of appeals' denial of Stafne's motions.

II. THE COURT OF APPEALS FAILURE TO PROVIDE A "REVIEWABLE" DECISION TO AN OBJECTION AND MOTIONS CHALLENGING ITS SUBJECT MATTER JURISDICTION AND IT'S

CONSTITUTIONAL AND LEGAL AUTHORITY TO ENACT PROCEDURAL RULES VIOLATES THE "STRUCTURAL INTERESTS" ARTICLE III WAS DESIGNED TO PROTECT.

More importantly, the court of appeals refusal to provide any authority or explanation for rejecting Stafne's Constitutional attacks on its authority to enact the challenged General Orders and procedures offends the "structural interests" Article III was designed to protect. *Commodities Futures Trading Comm'n v Schor*, 478 U.S. 833, 850(1986). In *Commodities Futures Trading Comm'n* this Court noted:

> "Article III, § 1 ... serves as 'an inseparable element of the constitutional system of checks and balances' ... [and thereby prevents] 'the encroachment or aggrandizement of one branch at the expense of the other.'" *Id.* at 850

Stafne presented a clear Constitutional challenge to the court of appeals' jurisdiction and authority. By refusing to address Stafne's non-frivolous challenge to the legality of its procedures, the court of appeals abused its power and effectively arogated legislative power to itself. For "Congress has the undoubted power to regulate the practice and procedure of federal courts." *Sibbach v. Wilson & Co., Inc.*, 312 U.S. 1, 9 (1941). Valid rules of procedure have "the force of a federal statute." *Id.* p. 13. If the ninth circuit rules are, as

alleged, inconsistent with FRAP 34(a) they are in violation of Congressional authority. If the court of appeals can simply reject without explanation any challenge to its authority premised on a violation of congressional power, then it can and does effectively arogate legislative power to itself.

The court of appeals for the ninth circuit, like all federal courts, is "limited in its modes of procedures, and the extent and character of its judgement. It must act judicially in all things and cannot transcend the power conferred by law." *Winsor v McVeigh*, 93 U.S. 274, 281 (1876). An act by a court "beyond the bounds of authorized judicial action ... offends fundamental principles of separation of powers." *Steel Company v Citizens for a Better Environment*, __U.S.__, 118 S. Ct. 1003, 1012, 140 L. Ed 2d. 210 (1998). This Court has recently reiterated "[e]very federal appellate court has a ***special obligation*** to 'satisfy itself not only of its own jurisdiction, but that of the lower courts in a cause under review...." [Emphasis Supplied] *Id.* This clear holding implies, and Stafne asserts here, that this Court has a "special" Constitutional obligation under Article III and the separation of powers doctrine to order an inferior court to provide a reasoned and reviewable response to any non-frivolous claims challenging the legality and Constitutional appropriateness of its rules of procedures. Such a holding is not only "necessary" and "appropriate in aid" of this Court's appellate jurisdiction under 28 U.S.C. 1651(a) but required to assure inferior courts, like the Ninth Circuit Court of Appeals, do not unconstitutionally arogate legislative

power to themselves without affording this Court a meaningful opportunity for appellate review.

Although the issuance of writs pursuant to 28 U.S.C. 1651 involves matters of discretion sparingly exercised, Sup. Ct. R. 20, this Court has found their use appropriate to confine inferior courts to their prescribed jurisdiction, *United States Alkali Ass'n v. United States*, 325 U.S. 196 (1945) and to prevent judicial usurpation of power. *Mallard v. United States Dist. Court for S. Dist. Of Iowa*, 490 U.S. 296, 309 (1989). Both situations exist here and mitigate in favor of the issuance of such writ.

CONCLUSION

For all of the foregoing reasons, this Court should issue a writ pursuant to 16 U.S.C. 1651(a) requiring the court of appeals to issue a reviewable decision setting forth a substantive basis for rejecting Stafne's motions challenging the Constitutionality and legality of its General Orders and procedures relating to oral argument.

Respectfully submitted,

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And as a member of the Bar of this Court
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APPENDIX A

Order Denying Stafne's Motions Challenging the Ninth Circuit's Oral Argument Screening Procedures, Filed April 29, 1998

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

No. 97-35163

Scott E. Stafne
Apellant

v.

William McTurnal and Janet McTurnal

On Appeal from the United States District Court
For the Western District of Washington
D.C. No. CV-96-5719-RJB
District Judge: Honorable Robert J. Bryan

Before: BRUNETTI, RYMER, and T.G. NELSON, Circuit Judges

This court has reviewed appellant's objection to this court's oral argument screening procedures and his supplemental motions and affidavit filed April 7, 1998. The relief requested is denied. The motion for sanctions filed March 25, 1998 is denied, as is appellees, motion to strike appellant's statement regarding recent cases and oral argument. Appellant Michael Failla's motion to strike, filed March 23, 1998, is denied. This case has been rejected from the screening program. It will be placed on the next available Seattle calendar.

All further submissions from the parties shall be referred to the panel assigned to consider the merits of this appeal.

No motions for reconsideration will be filed or entertained.

APPENDIX B

MEMORANDUM[1] Opinion of the United States Court of Appeals for the Ninth Circuit, Filed August 6, 1998

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

No. 97-35163

Scott E. Stafne,
Appellant

v.

William McTurnal and Janet McTurnal

Appeal from the United States District Court
for the Western District of Washington
Robert J. Bryan, District Judge, Presiding
Argued and Submitted July 10, 1998

Seattle, Washington

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[1] This disposition is not appropriate for publication and may not be cited to or by the courts of this circuit except as provided by Ninth Cir. R. 36-3.

BEFORE: CANBY and TASHIMA, Circuit Judges, and EZRA,[2] District Judge

The district court properly dismissed Stafne's RICO claim for failure to allege conduct that either constitutes a continuing pattern of criminal activity or threatens such activity. See H.J., Inc. v. Northwestern Bell Tel. Co., 492 U.S. 229, 242 (1989); Allwaste, Inc. v. Hecht, 65,F.3d 1523, 1527 (9th Cir. 1995). In addition, Stafne failed to allege the predicate acts of mail fraud with sufficient specificity. See In re GlenFed, Inc. Sec. Litig., 42 F.3d 1541, 1547 (9th Cir. 1994).

The district court had discretion to decline to exercise supplemental jurisdiction over Stafne's state law claims. See Sinaloa Lake Owners Ass'n v. City of Simi Valley, 70 F.3d 1095, 1102 (9th Cir. 1995). Stafne's discovery and continuance requests properly were denied because his allegations failed to state a claim. See Rutman Wine Co. v. E.& J. Gallo Winffy, 829 F.2d 729, 738 (9th Cir. 1987).

Stafne's request for sanctions and other various motions are derivative of his substantive claims, and therefore properly were dismissed therewith.
AFFIRMED.

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**Honorable David A. Ezra, United States District Judge of the District of Hawaii, sitting by designation.

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APPENDIX C

STAFNE'S OBJECTION TO THIS CIRCUIT'S ORAL ARGUMENT SCREENING PROCEDURES AND MOTIONS RELATED THERETO, FILED FEBRUARY 25, 1998

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

No. 97-35163

Scott E. Stafne,
Appellant

v.

William McTurnal and Janet McTurnal

STAFNE'S OBJECTION TO THIS CIRCUIT'S ORAL ARGUMENT SCREENING PROCEDURES AND MOTIONS RELATED THERETO

Scott E. Stafne (Stafne) respectfully objects to the Ninth Circuit's oral argument screening procedure because it 1.) Unconstitutionally delegates Article III

responsibilities to staff attorneys and 2.) violates due process. Stafne moves this Court to change its screening procedures concerning oral argument in such a way as to conform to Article III, the due process clause, and the language of FRAP 34(a) and Ninth Cir. R. 34-4.

FACTS

Stafne received this circuits screening letter form informing him that "[t]he United States Court of Appeals for the Ninth Circuit is considering submission of your case without oral argument". (Exhibit 1) The letter indicated Stafne had ten days to set forth reasons why oral argument should be heard and specifically referred to Ninth Cir. R. 34-4.

Stafne responded by filing "Appellant's Statements Re Recent Cases and Oral Argument". (Exhibit 2) The McTurnals then filed a frivolous motion[1] to strike Stafne's statements regarding recent cases and oral argument. (Exhibit 3) Stafne responded to the McTurnals' motion to strike (Exhibit 4) and as yet there has been no ruling on the motion

On January 30, 1998, Stafne wrote a letter to Chief Judge Proctor Hug requesting information about the procedures the Ninth Circuit was using to implement FRAP 34(a). (Exhibit 5) On February 5. 1998 Molly C. Dwyer responded to that letter. (Exhibit 6). Ms. Dwyer's letter indicates this Court has changed its screening procedures from those enunciated in *In Re*

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[1] The McTurnals' motion to strike Stafne's statements as to why oral argument should be allowed was facially frivolous because both FRAP 34(a) and Ninth Cir. R. 34-4 gives the parties an absolute right to file such statements.

Amendment of Rule 3, 440 F. 2nd 847 (1970). Under the original procedures no case was placed in a "category of cases to be submitted without oral argument unless there is, first a recommendation by a law clerk that the case be so satisfied, and second, *a unanimous vote in favor of such action by a panel of three judges*". *Id.* P. 849. After this initial screening by a panel of judges litigants were then afforded an opportunity to petition for oral argument. The current system assigns this preliminary screening responsibility formerly performed by a panel of three judges to a staff attorney.

Stafne believes the above facts indicate that this Court's screening procedure is unconstitutional. Because procedural due process objections and Article III rights can be waived, *Commodity Futures Trading Commission v Shor*, 478 U.S. 833, 848 (1986), Stafne intends to make clear by this objection and motion that he is not waiving any constitutional rights.

ARGUMENT

This court has the authority and responsibility to pass on the validity of its own rules. *Mississippi Publishing Corp. v Murphree*, 362 U.S. 438, 444, 90 L. Ed. 185, 66 S. Ct. 246 (1946) (the fact that the Supreme Court promulgated the Federal Rules of Civil Procedure "does not foreclose consideration of their validity, meaning, or consistency"); *N.L.R.B. v Intern. Assoc. of Heat and Frost Insulators and Asbestos Workers*, 476 F. 2d 275 (3d. Cir. 1973) (considering challenge to local rule as inconsistent with Federal Rules of Appellate Procedure).

Although due process does not mandate oral argument in every adjudicatory proceeding, *Federal Communications Comm'n v WJR, t\The Goodwill Station, Inc.*, 337 U.S. 265, 276, 93 L. Ed. 1353, 69 S. Ct. 1097 (1949), "the right of oral argument as a matter of due process varies from case to case in accordance with differing circumstances, as do other procedural regulations". *Id. See also Londoner v Denver*, 210 U.S. 373, 385, 52 L. Ed. 1103, 285 S. Ct. 708 (1908) (holding due process required allowing oral argument during an adjudicatory hearing).

There has been little litigation in the federal courts of appeal related to those "differing circumstances" in which due process requires oral argument because FRAP 34(a) mandates that "[o]ral argument *shall be allowed in all cases unless pursuant to local rule a panel of three judges determines, after examination of the brief and record, shall be unanimously of the opinion that oral argument is not necessary*" based on specific minimum criteria set forth in the rule. These criteria are for submitting cases without oral argument are set forth in subsections 1, 2, and 3 of FRAP 34(a) and clearly pass due process guarantees.

This circuit adopted Ninth Cir. R. 34-4 to implement F.R.A.P. 34(a). Stafne has no complaint with the face of this Local Rule. His quarrel is with its present
implementation. The first Local Rule implementing FRAP 34(a) provided that initial screening was to be done by a panel of judges. *Id.* Ms. Dwyer's letter indicates this Circuit now delegates the original

screening panel's role in the FRAP 34(a) and Ninth Cir. R. 34-4 process to a staff attorney. This appears to be a unique implementation of FRAP 34(a) as most other circuits use screening panels of judges to determine those cases which maybe be submitted without oral argument. *See e.g. George W. Bennett Bryson & Company, LTD. v Norton Lilly & Company, Inc.*, 502 Fed. Cir. 1045 (5th Cir. 1974)[2]; *U.S. Barber*, 447 F. 2d 1267, 1271, n. 10.

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[2] In this case the fifth circuit noted with regard to its screening procedure that:

> *The important thing is that this screening is a judicial one performed by Judges, not the Clerk or other non-judicial staff. It is done through a series of standing panels of three Judges, made up of Active Fifth Circuit Judges only. Cases are not submitted to a screening panel until all briefs are in or the allowable FRAP time has expired. When cases are ripe for screening they are submitted to the screening panels at random, without reference to subject matter, state of origin, or any other criteria.*
>
> As an added safeguard against even the remote possibility of oral argument being denied by a single Judge, the procedure calls for unanimous panel action to put the case on the Summary Calendar. Carrying it a step further, if after placing it on the Summary Calendar, any member of the panel has doubts or unresolved differences with the proposed opinion, the case is automatically removed and reclassified for full or limited argument. In other words, the classification of the case and its disposition must be unanimous. This demands informed, individual action by each panel

Stafne believes this circuit's procedure is constitutionally infirm because 1.) it delegates Article III decision making pursuant to the FRAP 34(a) and Ninth Cir. R. 34-4 to a staff attorney without sufficient safeguards to protect litigants rights; and 2.) violates procedural due process by failing to notify the litigants of the judicial delegation of authority to staff attorneys and in failing to require the staff attorney to provide any rationale supporting his conclusions as to which subsection of FRAP 34(a) (1 or 2 or 3) and 34-4 (a or b or c) merits dispensing with oral argument.

At the outset it should be noted that the staff attorney's initial decision is represented to litigants in the screening letter as having been made by the *court*, not a staff attorney. In this regard the screening letter states:

> "The United States Court of Appeals for the Ninth Circuit is considering submission of your brief without oral argument. You have 10 days from the date of this letter to present a statement setting forth the reasons why oral argument should be heard in this case. See 9th Cir, R. 34-4."

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member which will always equal, if it does not exceed, that required for an orally argued case. . *Id.* at 806. The system thus requires double unanimity -- three active judges must agree both to the decision on the merits of the case and to the lack of warrant for oral argument, otherwise oral argument is ordered.

Reference to Rule 34-4 does not appraise the litigants that this screening function is being done by a staff attorney. Rather, reference to Rule 34-4 clearly implies that the initial screening decision was done by a "panel of judges". The Rule says that "there may be placed in this class [cases to be submitted without oral argument] any appeal ... *which a 3-judge panel is of the unanimous opinion that*" the appeal meets the one of the criteria set forth in Ninth Cir. R. 34-4. The screening letter implies that the recipient's appeal has been placed in this class of cases by a panel of judges and the parties are now being given their 10 day opportunity pursuant to Local Rule 34-4 to "file a statement setting for the reasons ... why oral argument should be heard".

Significantly, the form screening letter does not set forth which criteria enunciated in FRAP 34(a) (1 or 2 or 3) and/or Ninth Cir. R. 34-4 (a or b or c) has been satisfied so as to place the appeal in the class of cases submitted without oral argument. Equally, significant is the merits panel review of the staff attorney's decision appears not to involve any consideration of the specific criteria of FRAP 34(a) or Ninth Cir, R 34-4 which justifies submission without oral argument. *See generally* the headings of all unpublished Ninth Circuit decisions which are decided without oral argument pursuant to 9th Cir. R. 34-4 which simply state:

"The panel unanimously finds this case suitable to decision without oral argument pursuant to Local Rule 34-4"

Article III responsibilities cannot be delegated to non-Article III judges absent procedural safeguards. *Northern Pipeline Construction Co. v. Marathon Line Co.*, 458 U.S. 50, 102 S. Ct. 2858, 73 L. Ed. 2d 598 (1982) (striking down that portion of the Bankruptcy Act which delegated judicial functions to non-Article III judges) Although the Supreme Court has allowed judicial functions to be delegated to non-Article III judges under certain circumstances, it has done so only where Congress has set forth constitutionally sufficient procedural safeguards.

For example, in *United States v Raddatz*, 447 U.S. 667. 100 S. Ct. 2406, 65 L. Ed. 2d 424 (1980) the Supreme Court upheld the Federal Magistrates Act even though it delegated certain Article III functions to a non-article III judge. The court upheld the delegation of certain judicial functions to a magistrate because there were sufficient procedures in place to insure that the ultimate judicial decision making was done by an Article III judge. Among those procedural protections which the Supreme Court found important for sustaining the delegation of judicial functions was 1.) the magistrate was required to provide the reasoning for his conclusions; 2.) the parties were appraised of the magistrate's reasoning and conclusions and could object thereto; and 3.) an Article III judge had to make a de novo determination "of those portions of the report or specified proposed finding or recommendations to

which objection is made."[3] The procedural protections afforded by the Federal Magistrates Act, 28 U.S.C. 636 are indicative of those procedural protections which must accompany any grant of Article III decision making. *Northern Pipeline Construction Co. v. Marathon Line Co.*, 458 U.S. 50, 102 S. Ct. 2858, 73 L. Ed. 2d 598 (1982). Those protections are not even approximated here. Moreover, it is Stafne's position that the lack of such protections also violates his procedural due process rights in this case. *Mathews v Eldridge*, 424 U.S. 319, 335 (1976).[4]

The Federal Magistrates Act specifically gives magistrates the power to hear certain types of adjudicatory matters under the supervision of an Article III judge. But there is no statute or rule authorizing the challenged grant of judicial decision making authority to a staff attorney. Indeed, the language of both FRAP 34(a) and Ninth Cir. R. 34-4 state that a panel of three judges should determine whether oral argument should be disallowed based on the criteria set forth in FRAP (a), (1) – (3) and Ninth Cir. R. 34-4 (a) – (c). Both rules also provide that a litigant shall have the right after

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[3] In order for an actual delegation of authority to a magistrate to be valid, the strict procedural safeguards set forth in the Act must be followed. *Jones v. Johnson, Director, Texas Department of Criminal Justice*, 1998 U.S. App. Lexis 1406 (5th Cir. 1998)

[4] In *Mathews* the court emphasized the three factors should be considered in determining whether the flexible concepts of due process have been satisfied" (a) the private interests implicated; (b) the risk of erroneous determination by reason of the process accorded and the value of added procedural safeguards; and (c) the public interest and administrative burdens, including costs that additional procedures would involve.)

notification of the *panel's decision* disallowing oral argument to present reasons why oral argument should be heard. But this procedural protection is not afforded those litigants who are initially screened by the staff attorney into the class of cases to be submitted without oral argument. Thus, where the Federal Magistrate Act grants specific authority to for magistrates to perform some Article III functions, there is no similar grant of authority for staff attorneys to be involved in FRAP 34(a) or Ninth Cir. R. 34-4 decision making. In fact, the use of staff attorneys to make initial screening decisions violates the language both Rules and is contrary to the procedures used by other circuits.

The Federal Magistrates Act both allows the delegation of judicial power in limited circumstances and informs the public of that delegation. Here there is no notice that adjudicatory functions have been delegated to a staff attorney. *Compare* Ninth Cir. R. 27-7 which specifically delegates authority to non-article III judges to hear certain matters to the unexpressed delegation of judicial authority involved here. Moreover, the letter, which is provided litigants, suggests that there has been a panel review of briefs and record pursuant to Ninth Cir. R. 34-4 and that the parties are now being given the 10 days provided by the local rule to object to the panel's unanimous determination. This letter does not give litigants adequate notice of the delegation of Article III decision making authority to a staff attorney.

The Federal Magistrates Act requires magistrates to issue findings of fact and conclusions of so that the

parties can challenge and an Article III judge can review de novo the Magistrate's decisions. There are no similar protections afforded under this circuit's screening procedure. Although both FRAP 34(a) and Ninth Cir. R. 34-4 include specific criteria which must be met to find that an appeal may be included in the class of cases for which oral argument is not permitted, the staff attorney does not provide the parties with any indication of which criteria s/he found to be satisfied. Rather, after the staff attorney determines that a case should not be orally argued, the clerk sends out a form screening letter which indicates that the Court is "considering submission of your case without oral argument" pursuant to Ninth Cir. R. 34-4. The letter provides no reference to which specific criteria the staff attorney found merited submission without oral argument or any explanation of his reasoning. As the parties are not made privy to the Staff Attorney's reasoning there is no meaningful opportunity to challenge his reasoning. Moreover, if the Panel is not provided with an explanation of the staff attorney's reasoning it cannot review the decision for compliance with FRAP 34(a) and 9th Cir. R. 34-4. *Cf.* Primus Automotive Financial Services, Inc. v Bartarse, 115 F. 3rd 644 (9th Cir. 1997) (failure to explicate reasoning prevented meaningful appellate review and merited remand); *Trulis v Barton*, 107 F. 3rd685, 695 (9th Cir. 1995).

The impact of the screening letter is especially egregious when sent to pro se litigants, like Stafne, as it implies the *Court* has found pursuant to Ninth Cir. R. 34-4 that his appeal met one of the criteria for submission without oral argument when this may not be

true. More likely the screening letter was based on the fact that the litigant was appearing pro se, *see In Re Amendment of Rule 3*, 440 F. 2nd 847 (1970), and not on any analysis of FRAP 34(a) or Ninth Cir. R. 34-4. Clearly, if pro se litigants are bring treated differently than other parties, procedural due process requires they be given adequate notice of this fact so that they can appropriately respond. But, the more fundamental question is what language of FRAP 34(a) or Ninth Cir. R. 34-4 gives this circuit the authority to treat pro se litigants different from other litigants with regard to oral argument?

Ms Dwyer suggests in her letter that the deficiencies in this circuit's screening procedures can be ignored because "regardless of the preliminary staff case management assessment, pursuant to Fed. R. App. P. 34 and Ninth Cir. R. 34-4, the decision whether to allow oral argument or not is always a unanimous one made by a three judge panel assigned to consider the merits of an appeal". But the Supreme Court has held that the fact that the ultimate decision may rest with an Article III judge does not vindicate a delegation of judicial power without attendant safeguards. *Northern Pipeline Construction Co. v. Marathon Line Co.*, 458 U.S. 50, 86, 102 S. Ct. 2858, 73 L. Ed. 2d 598 (1982). Those attendant safeguards necessary to sustain an constitutional delegation of Article III power and to satisfy due process are not met here because this court delegates judicial authority 1.) without adequate notice to litigants that it is doing so; 2.) without any specific authority for making the delegation; 3.) in contravention to the language of the FRAP 34(a) and Ninth Cir. R 34-

4; and 4.) without requiring the staff attorney to explicate the reasoning behind an adjudicative decision so that it may be adequately challenged and reviewed.

For the foregoing reasons, Stafne respectfully objects to this court's screening procedures as violating Article III and procedural due process. Stafne moves this Court change its screening process to conform to with Article III, procedural due process, and the language with FRAP 34(a) and Ninth Cir. R. 34-4.

Respectfully submitted,

s/ Scott E. Stafne

EXHIBIT 1 TO OBJECTION TO THIS CIRCUIT'S ORAL ARGUMENT SCREENING PROCEDURES AND MOTIONS RELATED THERETO, FILED FEBRUARY 25, 1998

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT
95 Seventh Street, P. 0. Box 193939
San Francisco, CA 94119-3939

January 6, 1998

CA No. 97-35163 Stafne v. McTurnal

To All Parties:

The United States Court of Appeals for the Ninth Circuit
is considering submission of your case without oral argument. You have ten (10) days from the date of this letter to present a statement setting forth the reasons why oral argument should be heard n this case. See 9th Cir. R. 34-4. Please send an original and three (3) copies of your statement to Clerk's Office in San Francisco, and show proof of service to opposing counsel.

The court welcomes additional citations, without argument, of relevant decisions rendered since the filing of a party's last brief. See Fed. R. App. P. 28(j). Send an original and three (3) legible copies to the Clerk's Office, on letter size paper, with proof of service on all parties.

Very truly yours,

Cathy A. Catterson
Clerk of Court

Deputy Clerk

EXHIBIT 2 TO STAFNE'S OBJECTION TO THE NINTH CIRCUITS'S ORAL ARGUMENT SCREENING PROCESS AND MOTIONS RELATED THERETO

APPELLANT'S STATEMENT RE RECENT CASES AND ORAL ARGUMENT

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

No. 97-35163

Scott E. Stafne
Appellant

v.

William McTurnal and Janet McTurnal

APPELLANTS STATEMENT RE RECENT CASES AND ORAL ARGUMENT

Citation of Recent Cases:

Handeen v Lemaine, 112 F3rd 1339(8th Cir. 1997); Fujisawa Pharmaceutical Co. v Kapooer, 115 F.3rd

1332 (7th Cir. 1997); *Schaifer & Nance Co. v Estate of Andy Warhol*, 119 F. 3d 91 (2nd Cir. 1997).

Appellant's Position With Regard to Oral Argument:

I agree that oral argument is not necessary with regard to any of the issues other than those which relate to RICO's substantive requirements with regard to closed ended continuity, open ended continuity and the continued viability of *Medallion Television Ent. v SelecTv of California*, 833 F. 2d 1360, 1363 (9th Cir. 1987).

The question of how the RICO's concept of "closed-ended" continuity applies to single victims of longterm frauds is an unresolved legal issue in this circuit and thus does not meet the criteria for denial of oral argument under FRAP 34(a).

Other Circuit Decisions

The question of whether and how a single victim can prove sufficient "closed ended continuity " to establish a RICO pattern in a case involving a single scheme occurring over a substantial period of time is one that has recently divided the Circuits. For example, in *Handeen v Lemaine,* 112 F 3rd 1339 (8th Cir. 1997) the Eighth Circuit reversed the dismissal of a RICO claim against a bankruptcy law firm and its client debtor for allegedly inflating debts so as to deprive a judgment creditor of the estate's assets. Despite the fact there was only a single victim, a single estate, and a single scheme which had to terminate at the end of the bankruptcy, the Eighth Circuit held that because the scheme had

continued for approximately three years there was sufficient closed ended continuity to establish a RICO pattern. Id. At 353. It distinguished its own previous authority holding that a single episode [was] not sufficient to establish a RICO pattern on the basis of the length of time of the criminal activity. Id. At 1553, n. 19

However, in *Schaifer &Nance Co. v Estate of Andy Warhol*, 119 F. 3rd 91 (2d Cir. 1997) the second circuit upheld a trial court's ruling that predicate acts occurring over a three year period were not "continuous" for RICO purposes because they "were acts related to a single scheme to defraud." By folding three years of predicate acts into a single fraud *(i.e.* the negotiation of a contract) the second circuit concluded there was not sufficient "closed ended continuity" to establish a RICO pattern. The Court noted, however, that the question of whether there was "closed ended continuity" was a "close question". What is significant in *Schaifer* is that the Second Circuit, like the Eighth Circuit, directly addressed the concept of "closed ended continuity" with regard to a single victim's RICO claim for longterm fraud in the negotiation of the contract.

The Seventh Circuit recently attempted to elucidate a rule with regard to when longterm predicate acts against a single individual pursuant to a single scheme would constitute "closed ended" continuity. It stated:

> A core RICO offense would be a criminal take over of a legitimate business which the criminal then used to launder his illegal earnings or commit further illegal activities

> behind the facade of an enterprise. [cites] Slightly outside the core, ... but within the prohibitory scope of the statute, would be the case of a person who controlled a company and used the mails to progressively fleece an elderly widow --first by soliciting ... her savings in a Ponzi scheme sponsored by the company, then urging her to sell her furniture and invest her proceeds in the scheme, then inducing her to take out a second mortgage on her house to enable further investment in the scheme, the whole campaign unfolding over several years and leaving her at the end destitute. [cites]. Id. '1337 - 1338

With regard to the case before it, the Seventh Circuit noted:

> "If the successive transactions had merely been installments in the sale of the company the requirement of a pattern probably would not have been satisfied [cites] because the reality was only a single fraud. But this was not an installment deal; Fujisawa did not commit itself when buying stock ... to buying the whole company." Id 1338.

Ninth Circuit Authority

In *H. J, Inc. vs Northwestern Bell Tel Co, 492* U.S. 229, 106 L. Ed. 2d 195, 109 S. Ct. 2893 (1989), the Supreme Court held that a plaintiff can prove threat

of continuing criminal activity by establishing closed ended continuity (i.e. criminal conduct occurring over a substantial period of time). Unlike the second, seventh, and eighth circuits, the Ninth Circuit has no published authority dealing with whether, and how, a single plaintiff who is injured by a fraud occurring over a substantial period of time may establish closed ended continuity. As this case directly raises that unresolved issue in this Circuit, (and one which is resolved inconsistently in other circuits), there is no ground for denying oral argument under FRAP 34 as the issue is not frivolous, and has not been recently authoritatively decided or adequately argued in the briefs[1].

The Ninth Circuit has recently used pre *H.J Inc.* cases such as *Medallion Television Ent.. v. SelecTv of California*, 833 F. 2d 1360, 1363 (9th Cir. 1987) in unpublished opinions to hold that one or two victims injured by a single scheme cannot establish a RICO pattern. These are the same cases the district judge and appellees use to justify the dismissing this RICO claim. But this appeal directly challenges the continued viability of Medallion as it regards *H.J Inc.*'s concept of closed ended continuity in cases involving single victims and single schemes[2]. Unless the panel concludes

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[1] Appellees chose to not even respond to this argument in their brief.

[2] *See* Part 2 of Stafne's Reply Brief (pages 2-6) which directly challenges the appellee's and the District Court's interpretation of *Medallion* to closed ended continuity cases as being inconsistent with the Supreme Court's decision in *H.J Inc. vs Northwestern*

that this argument is frivolous[3], then there are no grounds under FRAP 34 for deciding this contention without oral argument.

Finally, even if this Circuit were to directly find that *Medallion* continues to be good law and applies to cases alleging "closed ended" continuity, there still would be legal and factual issues as to when substantial actions over time become a single fraud which cannot form the basis for a pattern under RICO. I should be allowed to argue the merits of the Seventh Circuit's approach in *Fujisawa Phamaceutical Co. v* Kaaoor, 115 F. 2d 1332 (7th Cir. 1997) since this Circuit has never precisely defined what a single act, episode, scheme, or fraud is. I should also be allowed to argue how the facts of my case meet whatever standard the Panel decides to adopt.

Although it is not stated as a factor in FRAP 34 for denying oral argument, I want to make sure that the Panel has no concerns about whether a pro se, appellant can adequately present oral argument. I believe I can. I graduated Order of the Coif from the University of Iowa

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Bell Tel Co. 492 U.S. 229, 106 L. Ed. 2d 195, 109 S. Ct. 2893 (1989). The appellees have never addressed this issue in their briefs.

[3]The Eighth Circuit distinguishing of its previous *Medallion*-like case on the basis of closed-ended continuity, *Handeen, supra,* at 1553, n. 9, clearly suggests that there may be some inconsistency between *Medallion's* single victim rationale and the concept of closed ended continuity.

Law School and received an LLM from the University of Washington Law School. I am or have been admitted to practice law before the United States Supreme Court, the Ninth, Eighth. and Seventh Circuit Courts of Appeal and the Supreme and other courts of the states of Washington, Iowa, and Indiana. I was an instructor of law at the University of Washington for a short period of time.

Although I quit the active practice of law a few years back because of an illness, my condition has recently improved and I have started accepting limited referrals from other lawyers.

Based on my own experience and my conversations with Ninth Circuit law clerks I know it is almost standard practice to allow oral argument. I surmise that the Panel's decision to forego it here does not bode well for the success of my appeal. I can't help but wonder, given the above arguments and the authority from other circuits, how much of a fair shake pro se litigants get when they challenge large firms and accuse their members of blatant misrepresentations.

Respectfully submitted,

s/ Scott E. Stafne

EXHIBIT 3 TO STAFNE'S OBJECTION TO THE NINTH CIRCUIT'S ORAL ARGUMENT SCREENING PROCESS AND MOTIONS RELATED THERETO

APPELLEES' MOTION TO STRIKE APPELLANT'S STATE RE RECENT CASES AND ORAL ARGUMENT

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

No. 97-35163

Scott E. Stafne
Appellant

v.

William McTurnal and Janet McTurnal

APPELLEES' MOTION TO STRIKE APPELLANT'S STATE RE RECENT CASES AND ORAL ARGUMENT

Defendants/Appellees William and Janet McTurnal hereby move the Court to strike Plaintiff/Appellant Scott Stafne's pleading styled "Statement Re Recent Cases and Oral Argument" (filed and served January 20, 1998).

Mr. Stafne's submission, ostensibly filed in response to the Court's recent notice to counsel (see letter to all parties from Cathy A. Catterson, Clerk of Court, dated January 6, 1998), fails to comply with Fed. R. App. P. 28(j):

(1) The cases cited[1] are not "relevant decisions rendered since the filing of a party's last brief." Mr. Stafne's Reply Brief in this appeal was filed and served on September 26, 1997.

(2), Mr. Stafne proffers argument, contrary to the express language of Fed. R. App. P. 28(j).

DATED: January 26, 1998.

PERKINS COIE LLP

By: s/ Stephen C. Willey
Ramer B. Holtan, Jr.
Stephen C. Willey

Attorneys for William and Janet McTurnal

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[1] Handeen v. Lemaire, 112 F.3d 1339 (8th Cir. 1997) (decided May 7, 1997); Fujisawa Pharmaceutical Co., Ltd. v. Kapoor, 115 F.3d 1332 (7th Cir. 1997) (decided June16, 1997); and Schlaifer Nance & Co. v. Estate of Andy Warhol, 119 F.3d 91 (2nd Cir. 1997) (decided September 10, 1997).

EXHIBIT 4 TO STAFNE'S OBJECTION TO THE NINTH CIRCUIT'S ORAL ARGUMENT SCREENING PROCESS AND MOTIONS RELATED THERETO

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

No. 97-35163

Scott E. Stafne
Appellant

v.

William McTurnal and Janet McTurnal

APPELLANT'S RESPONSE TO MOTION TO STRIKE APPELLANT'S STATEMENT RE RECECNT CASES AND ORAL ARGUMENT

The McTurnals argue that Stafne's "Statement of Recent Cases and Oral Argument" should be stricken

pursuant to Fed. R. Civ. Pro. 28 (j) because 1.) the cases cited are decisions rendered "since the filing of the party's last brief" and 2.) because Mr. Stafne "proffers argument".

At the outset, it should be noted that Fed. R. Civ. Pro. 28 (j) only applies to the "Citation of Supplemental Authorities". No rule prohibits argument or the citation of authorities with regard to why oral argument should be held in a particular case. *See* Fed. R. Civ. Pro. 34 (a). Stafne had to make arguments to establish that his case does not satisfy the criteria for foregoing oral argument.

In this regard he had to show: That the dispositive issue(s) in the appeal have not been recently authoritatively decided. He attempted to do this by showing that he is directly attacking the continued viability of *Medallion Television Ent. v. SelecTv of California*, 833 F. 2d 1360, 1263 (9th Cir. 1987) under the Supreme Court's subsequent decision in *H. J., Inc. vs Northwestern Bell TeL Co.*, 492 U.S. 229, 106 L. Ed. 2d 195, 109 S. Ct. 2893 (1989). This issue has never been addressed in this Circuit.

Stafne also had to show that his appeal was not frivolous. He did this by showing that other circuits have adopted different tests for the application of *H. J., Inc. vs Northwestern Bell Tel Co.*, 492 U.S. 229, 106 L. Ed. 2d 195, 109 S. Ct. 2893 (1989)'s concept of closed-ended continuity to cases involving single victims and single frauds. He also showed that there was a difference of opinion in various circuits about what constitutes a "single fraud" and that this Circuit had not addressed that issue.

Stafne established that the briefs submitted to the Court do not adequately address this issue because the McTurnals failed to respond to the impact of *H. J., Inc. vs Northwestern Bell TeL Co.*, 492 U.S. 229, 106 L. Ed. 2d 195, 109 S. Ct. 2893 (1989) on *Medallion Television Ent. v. SelecTv of California*, 833 F. 2d 1360, 1263 (9th Cir. 1987) in any of their briefs before this court or the district court.

It is difficult to imagine a more compelling situation for oral argument than when a litigant makes a direct challenge to a Circuit Court of Appeal's precedent based upon a subsequent decision of the United States Supreme Court[1].

As there is no prohibition in Fed. R. Civ. Pro. 34 (a) regarding a litigant arguing and citing authority as to why oral argument should be held, McTurnals' motion is not well taken and must be rejected.

As to McTurnals' objections to Stafne's citation of authority, McTurnal is wrong in arguing that Stafne's Citation of Recent Cases contains argument. It does

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[1] Indeed, should oral argument not be granted I will request a stay of this Circuit's deciding this case so that I might seek a supervisory writ from the United States Supreme Court compelling oral argument on this issue. I know the authority exists for such a writ as I was successful in obtaining one against this Circuit from Judge Rehnquist when this Court refused to consider whether Judge Schwarzer had inappropriately granted a temporary restraining order in violation of the express terms of the Fishery Conservation and Management Act. (I will provide this cite after the filing of this brief as I am concerned at this point about timely responding to what may be a procedural motion which can be acted upon without response from me. *See* Fed. R. Civ. Pro. 27 (b).

not; only "Apellant's Position with Regard to Oral Argument" sets forth any argument. Assuming the McTurnals are correct in their dates, it does appear that all of the decisions were decided prior to the date Stafne's brief was filed. However, the time period was less than 5 months for any of the cases and less than 16 days for one of the cases. It is not clear whether the later ones were published at the time Stafne's brief was filed. Assuming the purpose of the rule is not to appraise this Court of relavent recent rulings (including those which may have been filed and not been published), then the McTurnals are correct in their argument and Stafne's Citation of Recent Cases does not comply with Fed. R. Civ. Pro. 28(j).

In conclusion, the McTurnals have presented no authority for striking Stafne's argument pursuant to Fed. R. Civ. Pro. 34 (a). Therefore, it should not be stricken. Depending upon the purposes underlying Fed. R. Civ. Pro. 28(j) it may be appropriate to strike Stafne's Citation of Recent Cases.

Respectfully Submitted,

s/ Scott E. Stafne

EXHIBIT 5 TO STAFNE'S OBJECTION TO THE NINTH CIRCUIT'S ORAL ARGUMENT SCREENING PROCESS AND MOTIONS RELATED THERETO

LETTER FROM SCOTT STAFNE TO THE HONORABLE CHIEF JUDGE PROCTOR HUG REQUENTING INFORMATION REGARDING THE EXPLAINING NINTH CIRCUIT'S ORAL ARGUMENT SCREENING PROCEDURE

October 7, 1998

The Honorable Judge Proctor Hug
Chief Judge
United States Court of Appeals
For the Ninth Circuit
95 Seventh Street
San Francisco, CA. 54103

Re: Ninth Circuit's procedures relating to Fed. R. App. Pro. 34

Dear Judge Hug:

I am an attorney admitted to practice before this court[1]. A few years ago, I retired from the day to day practice of law

[1] I am or have also been admitted to practice before the United States Supreme Court, the Seventh and Eighth Circuits Court of

due to a disability. By the grace of God I have recovered from most of my problems and recently agreed to accept a limited number business tort referrals from other lawyers.

During the period of my disability, I filed a business tort suit on my own behalf with the Western District of Washington. The defendants, who were represented by Perkins-Coie, filed a Motion to Dismiss which was granted. I brought an appeal pro se[2]. One of the issues raised in my arguments before the district court and this court was that Ninth Circuit authority had been overruled by a subsequent Supreme Court decision.

Given my direct challenge to Ninth Circuit authority I was a bit surprised to get a letter from this Court indicating that a panel of judges had found my case inappropriate for oral argument pursuant to Fed. R. Civ. Pro. 34 and that I should submit a response if I disagreed with this conclusion. I submitted a response. Appellee's counsel moved to strike my response because it contained argument as to why I believed oral argument was necessary.

After some further research on Fed. R. Civ. Pro 34, I started to wonder just what procedures the Ninth Circuit was using to comply with its mandates. I called court staff and was referred to various departments. What I was told by various staff members seemed to support this scenario: prior to the issuance of the form letter I received, my case was referred to staff attorneys. I asked the Clerk whether these

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Appeal, and in the states of Washington, Indiana, and Iowa. During the period of my limited retirement, I maintained my Washington State law license and admission to the federal courts.

[2] The case number of the appeal is 97-35163.

staff attorneys then referred their findings onto a panel of judges. He said he could not answer that question. I asked whether the reason for this was that he did not know the answer or that he could not tell me. He said he could not tell me. He did indicate, however, that there was no current panel of judges presently sitting to review Fed. R. App. 34 questions. He further indicated that docket records were not even obtained from the district court before the writing of the form letter I received. I do not recall whether he said that the docket records would be provided after someone responded to the form letter, or only after it was decided that oral argument should be held. I, of course, want the record reviewed by a panel of judges before a decision is made with regard to oral argument.

As a person (and a lawyer admitted to practice in this court) who has had my appeal found preliminarily not suitable for oral argument, I have a direct interest in knowing how these decisions are made. Fed. R. Civ. Pro 34 (a) states in pertinent part:

> Oral argument shall be allowed in all cases unless pursuant to a local rule *a panel of three judges, after examination of the briefs and record, shall be unanimously of the opinion* that oral argument is not needed. ....

At this point, the only information I have regarding this Circuit's implementation of Fed. R. Civ. Pro. 34 (a) is that my appeal was found not suitable for oral argument notwithstanding its direct challenge to Ninth Circuit

authority in light of subsequent Supreme Court authority and comments from a clerk that indicate this Circuit may not be following the dictates of the emphasized portion of the rule. Accordingly, I would appreciate this court providing me with either a copy of its procedures relating to its implementation of Fed. R. Civ. Pro 34 or a brief explanation of its procedures.

Sincerely yours,

S/ Scott E. Stafne

c: Steve Willey

EXHIBIT 6 TO STAFNE'S OBJECTION TO THE NINTH CIRCUITS'S ORAL ARGUMENT SCREENING PROCESS AND MOTIONS RELATED THERETO

LETTER FROM MOLLY C. DWYER TO SCOTT E. STAFNE EXPLAINING NINTH CIRCUIT'S SCREENING PROCEDURE

Office of the Staff Attorneys
UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT
95 Seventh Street
Post Office Box 193939
San Francisco, California 94119-3939

Molly C. Dwyer
Chief Deputy Clerk
Senior Staff Attorney

February 5, 1998

Mr. Scott Stafne, Esq.
801 Pine Street
Suite 6C
Seattle, Washington 98101

Dear Mr. Stafne:

I write in response to your letter dated January 30, 1998. Specifically, I write to apologize on behalf of

the court for what appears to be misleading information given to you by one of our employees.

At the completion of briefing, all appeals are reviewed for case management purposes by a group of experienced staff attorneys who, inter alia, make an initial recommendation about whether, pursuant to Circuit Rule 34-4, oral argument would assist in the decision-making process. If the attorney concludes that a case falls within the scope of Circuit Rule 34-4, the parties will be so notified, and given an opportunity to object. Any objections received will be forwarded to the panel of three judges assigned to consider the merits of the appeal. In considering the merits, the panel will of course have access to the briefs and record, and if any one of the three judges determines that oral argument is in fact necessary, he or she will so order. If, on the other hand, the panel unanimously concludes that oral argument is not necessary, they will, in disposing of the case on the merits, inform the parties of their ruling on the issue.

In short, regardless of the preliminary staff case management assessment, pursuant to Fed. R. App. P. 34 and Ninth Cir. R. 34-4, the decision whether to allow oral argument or not is always a unanimous one made by the three judge panel assigned to consider the merits of an appeal, a decision made only after a full review of the briefs and record. This explains why cases initially slated for submission on the briefs wind up being orally argued, and cases initially slated for argument wind up being submitted on the briefs.

If you have any further questions regarding this issue, please do not hesitate to contact me.

Sincerely,

s/ Molly C. Dwyer

APPENDIX D
LETTER FROM CLERK OF COURT NOTIFYING STAFNE THAT HIS CASE HAD BEEN REASSIGNED TO AN ORAL ARGUMENT PANEL,
Dated April 2, 1998

UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT
P.O. BOX 193939
SAN FRANCISCO, CALIFORNIA 94119-1939
April 2, 1998

In re: 97-35163 Stafne v. McTurnal

Recently you received notice that the United States Court of Appeals was considering submitting your case without oral argument. That notice reflected the tentative assignment of your case to a panel of the Court assigned to decide cases without oral argument.

Upon further consideration, the Court has decided that your case should be reassigned to an oral argument panel. Although in most instances a reassigned case will receive oral argument, the panel

of judges to whom the case will be assigned has discretion to order the case submitted on the briefs without oral argument. When the time and place for argument before or submission to an argument panel has been determined by the Court, our office will notify you by mail.

Very truly yours,

CATHY A. CATTERSON
Clerk of Court

s/ Tim Horn
Deputy Clerk

APPENDIX E

STAFNE'S SUPPLEMENTAL MOTIONS RELATING TO STAFNE'S PREVIOUSLY FILED "OBJECTION TO THIS CIRCUITS ORAL ARGUMENT SCREENING PROCEDURES AND MOTIONS RELATING THERETO", FILED APRIL 4, 1998

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

No. 97-35163

Scott E. Stafne
Appellant

v.

William McTurnal and Janet McTurnal

STAFNE'S SUPPLEMENTAL MOTIONS RELATING TO STAFNE'S PREVIOUSLY FILED "OBJECTION TO THIS CIRCUITS ORAL ARGUMENT SCREENING PROCEDURES AND MOTIONS RELATING THERETO

PROLOG

The Supplemental Motions contained herein were printed and ready to submit to the court on Friday, April 3, 1998 at approximately 6:00 p.m. Prior to the time he could mail them, Stafne received a letter from the Court on Saturday, April 4, 1998, indicating that his case had been assigned to the oral argument calendar.

Notwithstanding this Court's recent assignment of his case to the oral argument calendar, Stafne respectfully asks this court to decide his "Original "Objection Challenging This Court's Oral Argument Screening Procedures and Motions Related Thereto" and these "Supplemental Motions". The relief he prayed for in his motions was not simply that his case be assigned to the oral argument calendar, but that "this Court ... change its screening procedures concerning oral argument in such a way as to conform to Article III, the due process clause, and the language of FRAP 34(a) and Ninth Cir. R. 34-4."

As Stafne challenges the constitutional authority of this circuit to have established the General Orders underlying this circuit's oral argument screening system, as well as the operation of this system, his motions attack this court's subject matter jurisdiction. *See infra.* pp. 9 – 10. A question of subject matter jurisdiction can be raised by anyone at anytime. *Mansfield Coldwater, & Lake Michigan Railway Company v. Swan*, 111 U.S. 379, 4 S. Ct. 510. 28 L. Ed. 462 (1884). Therefore, Stafne respectfully requests the issues presented in his original objections and these supplemental motions be decided by this court.

Stafne also respectfully asserts that recently granting him oral argument does not render his motions attacking the constitutional validity of this court's procedures as moot. *See* e.g. *Richmond Newspapers v Virginia*, 448 U.S. 555, 562, 100 S. Ct. 2398, 61 L. Ed. 2d 973 (1980); *Gannett Co. v Pasquale*, 442 U.S. 368, 377- 378, 99 S. Ct. 2898, 61 L. Ed. 608 (1979

MOTION I:

Stafne respectfully moves a three judge panel review and decide the Constitutional challenges to this circuit's oral argument screening process raised in his previously filed "Objection to this Circuit's Oral Argument Screening Procedures and Motions Related Thereto" (hereafter referred to as "original objections") and the supplemental motions set forth herein.

ARGUMENT

Stafne's case has been assigned to the oral screening calendar pursuant to this circuit's General Orders. Stafne has received the form letter sent by the clerk's office pursuant to 6.5(b). Stafne has responded to that form letter stating why his case does not meet the criteria of FRAP 34(a) or 9th Cir. 34-4 for submission without oral argument. Stafne's response has presumably been referred to a Staff Attorney who has not exercised his/her discretion pursuant to General Order 6.5(b) to place Stafne's case on the oral argument calendar.

Stafne's "original objections" and these motions contend this circuit's oral argument screening process is

unconstitutional and that this court does not have jurisdiction to impose this process upon him. The Local Rules and General Orders provide that Stafne's written motions and memoranda challenging the constitutionality of this circuit's oral argument screening procedures might never be reviewed by a single judge[1].

FRAP 2 provides "... for good cause shown, a court of appeals may ... suspend the requirements or provision of these rules in a particular case upon the application of a party...". Stafne respectfully contends the Constitutional challenges he has raised to this circuit's screening process are sufficiently important to the administration of justice as to constitute good cause for these motions and memoranda to be scrutinized by a three judge panel.

MOTION 2:

Stafne respectfully moves this court declare the Ninth Circuit's Oral Argument Screening Procedures

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1.) General Order 6.3(c) provides that these motions will be given to a staff attorney who shall refer "the motion to the screening panel, single judge, appellate commissioner or a motions attorney, as appropriate, for processing." Even if referred to the oral screening panel, General Order 6.5.(c) provides that the staff attorney will "prepare proposed memorandums of the cases" and "orally present the proposed dispositions to the screening panel". If the screening panel agrees with the proposed disposition, the judges will not be provided the litigants' memoranda, briefs, or the district court record. *Cf.* General Order 6.5(d) which provides that the panel receives these documents in cases placed on the written screening calendar.

established by its General Orders to be inconsistent with Article III, the First Amendment, the Fifth Amendment and FRAP 34(a). Additionally, Stafne moves this court hold there was no subject matter jurisdiction for this court to issue the letter sent him pursuant to General Order 6.5(b) or to impose this circuit's oral argument screening procedures upon him.

ARGUMENT

After filing his "original objections" Stafne received a copy of this circuit's General Orders. Review of the General Orders substantiates the constitutional infirmities identified in Stafne's "original objections" and indicates additional constitutional inadequacies with this circuit's oral argument screening system[2]. The procedures established by the General Orders relating to Oral Argument that are challenged herein are summarized below. The text of the pertinent provisions of the General Orders is included as Appendix 1 hereto.

General Order 6.5 (a) delegates original screening calendar decisions to the Clerk's office. It states:

> "Cases are assigned to screening calendars based on the numerical weight given to the case by the Clerk's office. Screening cases must be eligible for submission without oral argument under FRAP 34(a) and Circuit

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[2] Review of the General Orders prompted Stafne to make further inquiries regarding this circuit's oral argument screening process. Court officials' responses to Stafne's inquiries are set forth in his affidavit supporting these supplemental motions and are by this reference incorporated herein.

Rule 34-4."[1]

Once Stafne's case was assigned to a screening calendar on the basis of the numerical weight given by the Clerk's Office it was "deemed suitable for submission without oral argument". *See* General Order 6.1 (j) and (k)[3].

The clerk's placement of Stafne's case on a screening calendar prompted notification of the litigants that the court had found this appeal suitable for submission without oral argument pursuant to 9th Cir. R. 34-4. *See* General Order 6.5(b) which states in pertinent part:

> "When a case is first assigned to the screening calendar, the Clerk's office shall send a letter to all parties advising them that

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[3] By defining cases assigned to the screening calendar as being "deemed suitable for submission without oral argument", the General Orders make the Clerk's numerical weighting process, rather than the criteria set forth at FRAP 34(a), the initial oral argument screening procedure. The General Orders attempt to mitigate this fact by stating that cases must be eligible for oral argument under FRAP 34(a) and Circuit Rule 34-4 before they are placed on a screening calendar. But the Order does not establish a procedure for determining which cases are eligible for submission without oral argument prior to the Clerk's application of numerical weight to each case. Nor does it delegate this responsibility to anyone and it is undisputed that a panel of three judges plays no part in the initial screening. So notwithstanding the reference in General Order's 6.5(a) to FRAP 34(a) it is clear that this circuit makes the initial screening decision regarding oral argument on the basis of a clerk's application of an undisclosed weighing process.

> their case is being considered for submission without oral argument, and if they have any objections they should be submitted within 10 days."

Because the screening letter went out as soon as the clerk assigned the case to a screening calendar, the letter's suggestion that it was prompted pursuant to 9th Cir R. 34-4 was inaccurate. Stafne didn't know this so he provided a statement explaining why his case did not meet any of criteria of FRAP 34(a) and 9th Cir. R. 34-4 for submission without oral argument.

Stafne's response was forwarded to a staff attorney who was given unfettered discretion to put Stafne's case on the oral argument calendar by General Order 6.5(b), which states:

> If objections are received, the Clerk's office forwards them on to the staff attorneys' office. *Upon review of the objections, the staff attorney may return the case to the Calendar Unit for reassignment to an oral argument calendar* If the staff attorneys decide to keep the case on the screening calendar, the objections shall be either (1) presented to the panel if the case is placed on an oral screening calendar, or (2) forwarded with the case materials to the panel if the case is placed on a written screening calendar." [Emphasis supplied]

Significantly, this General Order provides no standards to guide the staff attorney in exercising this discretion. The staff attorney did not exercise his unfettered discretion to place Stafne's case on the oral argument calendar (for whatever reason). Accordingly, the next step in the resolution of Stafne's right to oral argument pursuant to FRAP 34(a) under this circuit's screening system will be the oral calendar disposition phase set forth in General Order 6.5.(c) (i), which provides in pertinent part:

> "[t]he staff attorneys shall prepare proposed memorandum decisions for cases that they place on the oral screening calendars .... If the three panel members unanimously agree with the disposition, the designated authoring judge shall sign a screening form, and the staff attorneys shall forward the final disposition and the submission to the Clerk's office for filing. The disposition shall include *a footnote stating that the panel judges unanimously agree that the case is suitable for submission on the briefs pursuant to FRAP 34(a) and Circuit Rule 34-4."* [Emphasis supplied]

Significantly, the General Order authorizes the panel to make a finding "the case is suitable for submission on the briefs pursuant to FRAP 34(a) and Circuit Rule 34-4" without any of the judges ever

having reviewed Stafne's FRAP 34 memoranda, appellate briefs, or the case record if the panel agrees with the staff attorney's proposed disposition of the case.

A.) This Circuit's Oral Argument Screening Procedures Are Inconsistent with FRAP 34(a)

In stark contrast to the procedures set up by this circuit's General Orders, FRAP 34(a) states simply:

> "Oral argument shall be allowed in all cases unless pursuant to a local rule a panel of three judges, *after examination of the briefs and record,* shall be unanimously of the opinion that oral argument is not needed. Any such local rule shall provide any party with an opportunity to file a statement setting forth the reasons why oral argument should be heard. *A general statement of the criteria employed in the administration of such local rule shall be published* and such criteria shall conform to the following minimum standard:
> Oral Argument shall be allowed unless
> (1) the appeal is frivolous;
> (2) the dispositive issue or set of issues has been recently authoritatively decided; or
> (3)the facts and legal arguments are

> adequately presented in the briefs and record and the decisional process would not be significantly aided by oral argument."

This circuit's oral argument screening system pursuant to its General Orders is facially inconsistent with FRAP 34(a) because it fails to recognize that screening is required to be done by judges pursuant to the specific criteria set forth in the rule. This circuit's rejection of the central tenets of the rule has resulted in demonstrable inconsistencies between the General Orders and FRAP 34(a).

For example, both the appellate rule and the local rule provide that parties shall be notified after a panel of three judges has unanimously determined that oral argument is not necessary pursuant to FRAP 34(a) and 9th Cir. R. 34-4 and given the opportunity to respond. What really happens under the General Orders is that the clerk's office assigns cases to screening calendars based on an undisclosed weighting process and then sends out letters indicating the court has pursuant to 9th Cir. R. 34-4 determined that oral argument may not be necessary.

FRAP 34(a) does not authorize this delegation of the judicial screening function to a non-Article III judge. FRAP 34(a) mandates that such notice go out only after a screening review by a panel of judges and provides no authority whatsoever for this circuit to require Stafne to assert his right to oral argument prior to a judicial screening. *Cf. Armstrong v Manzo*, 380 U.S. 545, 85 S. Ct. 1187 (1965).

FRAP 34(a) contemplates that pursuant to the judicial screening procedure judges will review the briefs and records, but the General Orders indicate that at no time whatsoever are the judges on the oral screening panel provided with copies of the briefs or record to review unless they question the staff attorney's proposed disposition of the case. *See* General Order 6.5.(c)(i); *compare with* General Order 6.5.(d) which mandates judges be given copies of the brief, excerpts of record, and selected portion of the record for cases assigned to the written screening calendar. The creation of a screening system via the General Orders which authorizes judges not to review the briefs and record when making screening decisions is facially inconsistent with FRAP 34(a).

FRAP 34(a) requires that any local rule enacted pursuant to it contain a "general statement of the criteria employed in the administration of such [local] rule" and that such criteria "be published in or with the [the local] rule". But under General Order 6.5.(a) the Clerk's Office initially screens cases pursuant to undisclosed numerical weighting criteria and under General Order 6.5(c) the panel affirms this screening if it agrees with the staff attorney's proposed disposition of the case. This circuit's reliance on these criteria (which are not "with or in the local rule") is facially inconsistent with the requirements of FRAP 34(a).

Because this circuit's screening procedures are not in conformance with the requirements of FRAP 34(a), the court has no authority to apply them to Stafne or anyone else. *See e.g. Winsor v McVeigh,* 93 U.S. 274,

281; 23 L. Ed. 914 (1876) ("Though the court may possess jurisdiction of a cause, of the subject matter, and the parties, it is still limited in its modes of procedure, and in the extent and character of its judgments. It must act judicially in all things, and cannot transcend the power conferred by law. ...) *See also Reynolds v Stockton,* 140 U.S. 254, 35 L. Ed. 464 (1891). As there has been no proper screening pursuant to FRAP 34(a) this court should rescind its previous notification that Stafne's case has been determined pursuant to FRAP 34(a) and 9th Cir, R. 34-4 to be eligible for submission without oral argument and either 1.) provide the judicial screening contemplated by FRAP 34(a) and 9th Cir. R. 34-4 or 2.) allow Stafne's case to proceed to oral argument. *Armstrong v Manes,* 380 U.S. 545, 85 S. Ct. 1187 (1965).

B.) This Circuit's Oral Argument Screening Procedures are inconsistent with generally accepted standards of appellate review and violate Article III of the United States Constitution.

The decisions of this court are subject to appellate review. Article III. As this court has often held, the appellate process requires a lower court to explain the basis for those decisions an appellate court must review. *See e.g. Kasza v Carol M. Brouner, Administrator of the United States Environmental Protections Agency,* 133 F. 3rd 1159 (9th Cir 1998) ("We agree with Kasza that

the district court should have explained its reduction [in attorneys fees]; otherwise meaningful appellate review is impossible.); *Trulis v Barton,* 107 F. 3rd 685, 692 (9th Cir. 1997) (requiring some "explanation or indication" of the district court's decision to not impose sanctions was required so the appellate court review the district court's decision); *Primus Automotive Financial Services, Inc. v Bartarse,* 115 F 3rd 644 (9th Cir. 1997)(holding district court's failure to explicate its reasoning process in imposing sanctions was an abuse of discretion because it frustrated appellate review); *Levald, Inc. v Ci-ty of Palm Desert,* 998 F. 2d 680, 692 (9th Cir) cert denied 127 L. Ed. 2d 217 (1994)(finding an abuse of discretion in refusing leave to amend because district court did not provide the reasons for its refusal and thereby frustrated appellate review); *Government of Virgin Islands v Bryon,* 818 F. 2d 1069 (9th Cir 1986) (finding an abuse of discretion by the district court in failing to explicate its reasoning for dismissing a case pursuant to the Speedy Trial Act because it frustrated appellate review.)

Notwithstanding this familiar maxim of appellate review, General Order 6.5 (c) mandates the creation of an unreviewable legal conclusion with regard to a litigant's right to oral argument pursuant to FRAP 34 (a) and 9th Cir, R. 34-4. In this regard General Order 6.5.(c) states:

> "The staff attorneys shall prepare proposed memorandum decisions for cases that they place on the oral screening calendars .... If the three panel members unanimously agree with the disposition,

> the designated authoring judge shall sign a screening form, and the staff attorneys shall forward the final disposition and the submission to the Clerk's office for filing. The disposition shall include *a footnote stating that the panel judges unanimously agree that the case is suitable for submission on the briefs pursuant to FRAP 34(a) and Circuit Rule 34-4."* [Emphasis supplied]

As can be seen, the triggering mechanism for the generalized assertion that a "case is suitable for submission on the briefs pursuant to FRAP 34(a) and Circuit Rule 34-4" is not a finding that a criteria of the applicable rules has been satisfied. Rather, the unreasoned legal conclusion that is set forth in the footnote results when a panel agrees with the staff attorney's proposed disposition of the entire case.[4]

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[4] Simply agreeing with the staff attorney's proposed disposition of a case is not the equivalent of meeting the more stringent criteria imposed by FRAP 34(a) or 9th Cir. R. 34-4. For as Roscoe Pound once wrote, "Good oral argument before a bench not too large is excellent insurance against one-judge [or one staff attorney] decisions." (Pound, Appellate Procedure in Civil Cases (1941) p. 393.) Oral argument is an important right in those cases which do not meet the criteria of FRAP 34(a) because:

> "it promotes understanding in ways that cannot be matched by written communication." (Com. on Revision of Fed. Ct. App. System, Structure and Internal Procedures: Recommendations for Change (1975) p. 48.) For example, in complex cases, oral argument "provides a fluid and rapidly moving method of getting at essential

The language of the footnote mandated by General Order 6.5(c) makes the litigant's right to oral argument unreviewable because it requires the court to state only a bald faced legal conclusion *(i.e.* that submission upon the briefs is warranted) and expressly authorizes the court to ignore its judicial responsibility to set forth those reasons a panel concluded the criteria of FRAP 34(a) and 9th Cir. R. 34-4 allowed submission of the case on the briefs[5].

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issues." (ABA Committee on Stds. of Jud. Admin., Stds.Relating to App. Cts. (Approved Draft 1977) p. 56.) In the words of one judge, "'Mistakes, errors, fallacies and flaws elude us in spite of ourselves unless the case is pounded and hammered at the Bar.'" (Cutler, Appellate Cases: The Value of Oral Argument (1958) 44 A.B.A.J. 831,832; see generally Stern, Appellate Practice in the United States (1981) pp. 358-359.)

No proof of the value of oral argument is more compelling, however, "than the fact that many judges find that the opportunity for a personal exchange with counsel makes a difference in result." (Com. on Revision of the Fed. Ct. App. System, Structure and Internal Procedures: Recommendations for Change, supra, at p. 47.) This aspect of oral argument – the chance to make a difference in result – is extremely valuable to litigants." *Moles v the Regents of the University of California*, 32 Cal. 3d 867, 872, 654 P. 2d 740 (1982).

[5] It seems clear based on the authority cited above that this court would not tolerate a district court rule which mandated that issues arising pursuant to a Federal Rule of Civil Procedure be summarily decided on the basis of a factually unsupported legal conclusion.

Accordingly, this General Order prevents any meaningful review of a party's denial of oral argument pursuant to FRAP 34(a). General Order 6.5.(c) is therefore unconstitutional of its face because it materially frustrates Stafne's right of appellate review to the Supreme Court under Article III.

C.) This Circuit's Oral Argument Screening Process is not open and is unfair to pro se litigants. It therefore violates the First and Fifth Amendments to the United States Constitution.

Our justice system has always recognized a common law rule that civil and criminal judicial proceedings are presumptively open. *Gannet Co., Inc. v Depesqucale,* 443 U.S. 368, 384 - 387, 99. S. Ct. 2898, 61 L. Ed. 2d 608 (1978). The Supreme Court has held that in certain situations this common law right has a constitutional basis. For example, in *Richmond Newspapers v Virginia,* 448 U.S. 555, 100 S. Ct. 2398, 61 L.Ed. 2d 973 (1980) the Court held First Amendment freedoms of speech, press, and assembly share a common core purpose of insuring freedom of communication on matters relating to the functioning of government, including the operations of the judiciary. Although the *Richmond* holding dealt with a criminal trial, footnote 17 indicates the First Amendment right to

open proceedings also applies to civil proceedings[6]. The reasons the Supreme Court has given for finding a First Amendment right to open judicial proceedings include "assurance that the proceedings were conducted fairly to all concerned"[7]; to "discourage ... decisions based on bias or partiality"[8]; so that "spectators learn about their government and acquire confidence in the judicial system"[9]; because "open proceedings enhanced the performance of all involved, protected the judge from imputations of dishonesty, and served to educate the public".[10] The Court has emphasized that "[t]he crucial prophylactic agents of the administration of justice cannot function in the dark, no community catharsis can occur if justice is done in a corner [or] any covert manner"[11]

Stafne respectfully contends the First

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[6] Justices Brennan and Marshall squarely indicated in Brennan's concurring opinion that they believed there was a right to open civil proceedings. *Id.* 448 U.S. at 599

[7] *Richmond Newspapers v Virginia,* 448 U.S. 555, 568, 100 S. Ct. 2398, 61 L. Ed. 2d
973 (1980)

[8] *Richmond Newspapers v Virginia,* 448 U.S. 555, 568, 100 S. Ct. 2398, 61 L. Ed. 2d
973 (1980)

[9] *In Re Oliver,* 333 U.S. 257, 271, 68 S. Ct. 499 (1947)

[10] *Richmond Newspapers v Virginia,* 448 U.S. 555, 568,100 S. Ct. 2398, 61 L. Ed. 2d
973 (1980)

[11] *Richmond Newspapers v Virginia,* 448 U.S. 555, 571,100 S. Ct. 2398, 61 L. Ed. 2d
973 (1980) (Brennan, J. Concurring)

Amendment also mandates open and public decision making by appellate tribunals with regard to legal determinations involving constitutional, statutory, or procedural rights, including, but not limited to, Stafne's right to oral argument under FRAP 34(a). This First Amendment right is violated in this case by this court's creation and enforcement of General Orders which a.) require the application of unpublished standards to screening cases for oral argument and b.) authorize the court to make conclusions of law with regard to the denial of oral argument[12] without any reasoned analysis based on the criteria of FRAP 34(a) or 9th Cir, R. 34-4.

The role that public and open judicial proceedings play in assuring fairness to litigants is also significant with regard to due process guarantees. For as the Supreme Court stated in *Marshall v Jerrico, Inc.*, 446 U.S. 238, 64 L. Ed. 2d 182, 100 S. Ct. 1610 (1980) "The Due Process Clause entitles a person to an impartial and disinterested tribunal in both civil and criminal cases". 446 U.S. at 242. Among the concerns protected by this rule, the Court noted, is the preservation of both the appearance and reality of fairness, "generating the feeling, so important to a popular government that no person will be deprived of his interests in the absence of a proceeding in which he may present his case with the assurance that the arbiter is not predisposed to find against him." (quoting *Joint Anti-Fascist Comm. V McGrath,* 341 123, 172, 95 L.

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[12] In *Londoner v Denver,* 210 U.S. 373,385, 52 L. Ed. 1103, 285 S. Ct. 708 (1908), the Supreme Court that the right to oral argument is required by due process in some cases.

Ed. 2d, 71 S. Ct. 624 (1951)

Stafne respectfully contends the specific facts of this case establish the screening system used by this circuit both appears to be and is, in fact, unfair. Stafne's substantive appeal specifically challenged Ninth Circuit authority based on a subsequent decision of the United States Supreme Court. It raised a first impression legal issue in this circuit. Accordingly, his appeal did not fall within any of the criteria of FRAP 34 (a) or Ninth Cir. R. 34-4 for inclusion in the class of cases to be decided without oral argument.

Notwithstanding Stafne's obvious right to oral argument pursuant to FRAP 34 (a) and 9th Cir. R. 34-4, his case was assigned to the oral screening calendar based on an undisclosed numerical weighing process. General Order 6.5(c). After assigning his case a "numerical weight", the "court" then sent Stafne a letter which by its reference to 9th Cir. R. 34-4 falsely indicated that a unanimous panel of three judges had found that one of the criteria set forth a sub-paragraphs (a), (b), or (c) had been satisfied and that Stafne now had a 10 day period under the rule to provide a statement why oral argument should be allowed[13].

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[13] Stafne respectfully contends that the letter itself was misleading and unfair because 1.) it erroneously implied that a panel of judges had 2.) reviewed the briefs and the record and 3.) found that case was not entitled to oral argument because one of the criteria of 9th Cir. 34-4 had been met, but 4.) never provided an explanation of the "court's" reasoning pursuant to the rule. In truth, no judges had considered the briefs or record and found the case eligible for submission based on the criteria of FRAP

Significantly, the letter set forth no reasoning with regard to how the "court" had come to the conclusion that Stafne satisfied one of the criteria of the 9th Cir. R. 34-4. After opposing counsel filed a motion to strike Stafne's statement regarding oral argument, Stafne began investigating this circuit's screening procedures. He was informed that among the several factors this circuit considers in the numerical weighing of cases is whether one of the litigants appeared pro se. Stafne was told that there was a "presumption" against oral argument in cases with a pro se litigant and that this may have been why he was denied oral argument. Stafne was specifically denied access to the criteria the staff attorneys and clerks used in making these determinations because they were "not public". *See* Stafne's affidavit in support of these motions.

Stafne respectfully contends that an undisclosed presumption against oral argument by pro se litigants is in direct contravention of the First Amendment as it insulates the court from public debate about whether pro se litigants are treated fairly. Such a presumption also violates the due process clause because it is unstated and the parties are not afforded notice of this criteria. *Armstrong v Manzo*, 380 F. 2d 545, 85 S. Ct. 1187 (1965). Additionally, the presumption appears[14] and is

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34(a) or 9th Cir. R. 34-4. Rather, a non-Article III judge put Stafne's case on the oral screening calendar based on an unpublished numerical weighting system that this "court" has refused to disclose to Stafne.

[14] The appearance of unfairness is exacerbated by this court's public abandonment of it's previous presumption against oral

unfair and violates the equal protection clause because there is no rational basis for assuming that pro se litigants, as a class, cannot enlighten the court through oral argument[15]. *See* e.g. *Romer v Evans*, 517 U.S. 620, 116 S. Ct. 1620 (1996). (applying rational basis test pursuant to the equal protection clause to a class of persons prevented equal access to seek petition the government)

Finally, the abdication of this court's responsibility to provide reasoning when ruling on legal issues authorized by General Order 6.5(c)(i) frustrates any meaningful review (public or appellate) of whether this circuit has improperly denied Stafne's right to oral argument.

MOTION III:

Stafne respectfully moves:

1.) for oral argument with regard to his "original objections" and these motions[16];

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argument for pro se litigants, *see In Re Amendment of Rule 3*, 440 F. 2d 847 (1970) and it's present undisclosed use of the same presumption to deny pro se litigants their right to oral argument.

[15] The fact that a person is a pro se litigant does not mean that he/she is not knowledgeable about the law or judicial procedures Indeed, Canon 5(1) of the Code of Judicial Conduct explicitly states judges may not practice law, but may appear only pro se. In this case, the pro se litigant is an attorney admitted to practice law before the supreme courts of three states, three federal circuit courts of appeals, and the United States Supreme Court. He also has been an instructor of law at the University of Washington.

[16] Stafne is aware that 9th Cir. R. 27-6 precludes oral argument unless otherwise ordered. Stafne contends here, however, that the First and Fifth Amendments require oral

2.) for disclosure of all documents used by court of appeals' employees in assigning cases to screening calendars pursuant to the General Orders and any documents that show a Ninth Circuit Court of Appeals employee considered the criteria of FRAP 34(a) and 9th Cir. R. 34-4 prior to sending Stafne the letter mandated by General Order 6.5(b);

3.) to attend the oral screening of this appeal before a panel of judges pursuant to General Order 6.5 (c); and

4.) that the oral screening of his appeal pursuant to General Order 6.5 (c) be recorded and/or transcribed.

These motions are grounded upon the common law presumption that judicial proceedings are open to the public and the incorporation of this principle into the First Amendment. *See supra.*, pp. 13 - 15 The motions are also premised on the Fifth Amendments requirement that judicial proceedings be fair and appear fair. *See supra.*, pp. 15 - 18. These motions are also premised upon Article III which requires this court to

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argument with regard to Stafne's specific allegations that this circuit's General Orders violate Constitutional provisions and are void. *Federal Communications Comm'n v WJR, t\The Goodwill Station, Inc.*, 337 U.S. 265, 276, 93 L. Ed. 1353, 69 S. Ct. 1097 (1949), "the right of oral argument as a matter of due process varies from case to case in accordance with differing circumstances, as do other procedural regulations". *Id. See also Londoner v Denver*, 210 U.S. 373, 385, 52 L. Ed. 1103, 285 S. Ct. 708 (1908) (holding due process required allowing oral argument during an adjudicatory hearing)

provide sufficient reasoning for its decision so as to enable appellate review. *See supra.*, pp. 10 – 13.

Certainly, the allegations that this Circuit has enacted General Rules that are inconsistent with law and adopted a procedure which utilizes unpublished standards to discriminate unfairly against the a particular class of litigants are issues of public importance and entitled to public discussion under the First Amendment. The openness mandated by the First Amendment is also required in this case by the Fifth Amendment's requirement that judicial proceedings be fair and appear fair. The secrecy inherent in this circuit's use of oral screening procedures which are "not public" is "profoundly inimical to this demonstrative purpose of the ... [judicial] process [and] breeds suspicion of prejudice and arbitrariness, which in turn spawns disrespect for the law." *Richmond Newspapers v Virginia,* 448 U.S. 555, 594, 100 S. Ct. 2398, 61 L. Ed. 2d 973 (1980) (Brennan, J, concurring). In this case "[t]he appearance of fairness can be best provided by allowing people to observe it" *Richmond Newspapers v Virginia,* 448 U.S. 555, 571, 594, 100 S. Ct. 2398, 61 L. Ed. 2d 973 (1980), which means making this court's decision making process with regard to these constitutional challenges as open as possible.

Respectfully submitted,

s/ Scott E. Stafne

APPENDIX ONE TO STAFNE'S SUPPLEMENTAL MOTIONS RELATING TO STAFNE'S PREVIOUSLY FILED "OBJECTION TO THIS CIRCUITS ORAL ARGUMENT SCREENING PROCEDURES AND MOTIONS RELATING

APPENDIX ONE

TEXT OF PERTINENT GENERAL ORDERS

CHAPTER VI.
Motions and Screening Cases
6.1 Definitions
* * *

(j) "Oral screening calendar" means a calendar consisting of ***cases deemed suitable for submission without oral argument that are presented orally to a three-judge screening panel.***

(k) "Written screening calendar" means a calendar consisting of ***cases that are deemed suitable for submission without oral argument that are submitted with written bench memoranda to a three-judge screening panel.***

* * *

Section 6.5. Screening Calendars
(a) Selection and Criteria of Cases for Screening Calendars

Cases are assigned to screening calendars based on the numerical weight given to the case by the Clerk's office. Screening cases must be eligible for submission without oral argument under FRAP 34(a) and Circuit Rule 34-4. Additionally they should meet all of the following criteria:

(1) The result is clear.

(2) Ninth Circuit based on circuit or Supreme Court precedent.

The disposition normally will not require an opinion. ***After the Clerk assigns a case to the screening calendar, the Clerk's office forwards the case materials to the staff attorneys. The staff attorneys then place each case on the oral screening calendar or a written screening calendar. ...***

(c) Oral Screening Panel Presentations

(i) Disposition of Cases

The staff attorneys shall prepare proposed memorandum dispositions for the cases that they place on the oral screening calendars. An authoring judge will be designated for each case presented to the oral screening panel, and the writing assignment will rotate among panel members.

The staff attorneys shall orally present the proposed dispositions to the screening panels at periodically scheduled sessions. After the staff attorneys have presented each case, the panel members discuss the proposed disposition and may make necessary revisions. ***If the three panel members unanimously agree with the***

disposition, the designated authoring judge shall sign a screening submission form, and the staff attorney shall forward the final disposition to the Clerk's office for filing. The disposition shall include a

footnote stating that the panel judges unanimously agree that the case is suitable for submission on the briefs pursuant to FRAP 34(a) and Circuit Rule 34-4. ...

(d) Written Screening Panels

The staff attorneys shall prepare bench memoranda for the cases that they place on the written screening calendars. The staff attorneys shall give the completed memoranda to the Calendar Unit. ***In addition to the briefs and excerpts of record filed by the parties, staff attorneys shall assemble such portions of the transcripts or clerk's record as they believe will be helpful to the panel in deciding the case.*** [Emphasis supplied]

APPENIDX E

STAFNE'S AFFIDAVIT IN SUPPORT OF SUPPLEMENTAL MOTIONS RELATING TO STAFNE'S PREVIOUSLY FILED "OBJECTION TO THIS CIRCUIT'S ORAL ARGUMENT SCREENING PROCEDURES AND MOTIONS RELATING THERETO"

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

No. 97-35163

Scott E. Stafne
Apellant

v.

William McTurnal and Janet McTurnal

STAFNE'S AFFIDAVIT IN SUPPORT OF SUPPLEMENTAL MOTIONS RELATING TO STAFNE'S PREVIOUSLY FILED "OBJECTION TO THIS CIRCUIT'S ORAL ARGUMENT SCREENING PROCEDURES AND MOTIONS RELATING THERETO"

I wrote the attached letter to the Honorable Judge Proctor Hug. I declare under the penalty of perjury that the communications with Ninth Circuit employees described in that letter are true and correct to the best of my information and belief.

s/ Scott E. Stafne

October 4, 1998

The Honorable Judge Proctor Hug
Chief Judge
United States Court of Appeals
For the Ninth Circuit
95 Seventh Street
San Francisco, CA. 54103

Re: Ninth Circuit's procedures relating to Fed. R. App. Pro. 34

Dear Judge Hug:

On January 30 1998, I wrote you requesting information regarding this court's procedures for screening cases for oral argument pursuant to Fed. R. Civ. Pro. 34(a) and Ninth Cir. R. 34-4. I received a response to this letter from Molly Dwyer, who is identified on her letterhead as "Chief Deputy Clerk, Senior Staff Attorney". It is attached hereto as Exhibit 1.

After receiving this response, I filed a prompt objection to this court's oral screening process as outlined in Ms. Dwyer's letter on grounds 1.) the screening procedure delegated judicial authority pursuant to FRAP 34(a) and Ninth Cir. R. 34-4 to a non-Article III judge in violation of the Article III; 2.) the screening procedure violated procedural due process because it failed to provide written standards for performing judicial functions; and 3.) the screening procedure was inconsistent with FRAP 34(a) and Ninth Cir. R. 34-4.

Since filing these objections and motions related thereto, I have spoken on several occasions with Ms. Dwyer and received from her a copy of this Circuit's General Procedures dated August, 1997. During our conversations, she has indicated that my case has been assigned to the oral screening calendar. Ms. Dwyer has also told me (as have other court employees) that there is a presumption[17] that pro se litigants are not entitled to oral argument. She has also indicated to me that there were several other factors staff attorneys considered in screening cases (*i.e.* whether the case was dismissed pursuant to a motion to dismiss), but that she could not remember them all. When I asked if the staff attorneys had written procedures they followed, Ms. Dwyer indicated there were such procedures. When I was asked for a copy of them, she told me the procedures were "not public".

I then reviewed this court's "General Orders". As you know, Section 6.5 deals with "Screening Calendars". Section (a) thereof states in pertinent part:

> "Cases are assigned to the screening calendars based on the numerical weight given by the Clerk's office. ... After the Clerk's office assigns a case to the screening calendar, the Clerk's office forwards the case materials to the staff

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[17] Some court employees have specifically used the term "presumption". Others have indicated that cases involving pro se litigants are routinely assigned to a screening calendar, which appears to be the same thing as a presumption that pro se litigants are not entitled to oral argument.

> attorneys. The staff attorneys then place the case on either an oral screening calendar or a written screening calendar. ..."

After reading this, I called the Clerk's office. I read the person who answered the telephone the above portions of the General Order and asked for a copy of the standards the clerk's office used in assigning numerical weight to cases pursuant to this order. She stated that she was "not sure" whether the standards relating to the weighting process were public information. She transferred me to the Calendar Unit.

I spoke with Yen in the Calendar Unit. I read her the same portion of the order. She said the order was incorrect to the extent it indicated that the Clerk's Office assigned a numerical weight to the cases for purposes of screening. Yen indicated that this was done by the Staff Attorneys. So she transferred me to the Staff Attorneys Office.

I next spoke with Jeff in the Staff Attorneys office. Jeff identified himself as a motions attorney. He stated that staff attorneys do use various factors in screening cases. Among those factors he mentioned were: whether a litigant was represented by counsel; complexity of legal issues; size of the record; whether the case was one of first impression; and whether the case had been dismissed before trial. When I asked for a copy of the standards the staff attorneys used, Jeff indicated he would call me back.

Jeff called back the next day and left a message on my voice mail. Jeff said that the only criteria the court uses with regard to the screening of cases is FRAP 34, Ninth Cir. 34-4, and the General Orders. He said there were no other written policies and that "[n]othing published is available".

Putting together what I have been told suggests two possible scenarios: 1.) The staff attorneys assign a weight to each case pursuant to Section 6.5 based on their own standards (which apparently includes such things as whether a party is appearing pro se); or 2.) the staff attorneys assign weight to cases based on written standards that are not available to the public.

As I am sure you can appreciate, it is a lawyer's worst nightmare to have legal rights resolved on the basis of unknown criteria and standards. Ms. Dwyer and all the persons I have spoken with in the Clerk's office have been very courteous and tolerant with my asking questions. What they have told me is the staff attorneys use certain standards outside of the criteria enunciated in FRAP 34(a) or Ninth Cir. R. 34-4 (i.e. whether a case is file pro se, etc.) as part of the numerical weighting process referred to in General Order 6.5. But they have not been able to provide me with a list of the standards staff employees use in this weighing process.

I do not feel comfortable asking staff personnel any further questions as they have provided me with the information they have. I believe that I must now

address my questions to the court itself. What I respectfully request as a member of the bar of this Circuit from you, as Chief Judge, is an on the record answer to whether any factors other than those enunciated in FRAP 34(a), and Ninth Cir. R. 34-4 are utilized in this court's initial screening pursuant to General Order 6.5.(a). If so, I would like to know whether these factors are written or unwritten. If written, I would like a copy of the factors or an explanation as to why they are not public.

It is with the utmost respect and deference to the role that our judiciary plays in our system of constitutional government that I (as a third generation lawyer) make these requests. I strongly believe that the courts must always be forthright and clear about the standards that they utilize in judicial decision making.

Sincerely,

s/ Scott E. Stafne

c: Steve Willey, Molly Dwyer

EXHIBIT 1 TO STAFNE'S APRIL 3, 1998 LETTER TO THE HONORABLE CHIEF JUDGE PROCTOR HUG

Office of the Staff Attorneys
UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT
95 Seventh Street
Post Office Box 193939
San Francisco, California 94119-3939

Molly C. Dwyer
Chief Deputy Clerk
Senior Staff Attorney

February 5, 1998

Mr. Scott Stafne, Esq.
801 Pine Street
Suite 6C
Seattle, Washington 98101

Dear Mr. Stafne:

I write in response to your letter dated January 30, 1998. Specifically, I write to apologize on behalf of the court for what appears to be misleading information given to you by one of our employees.

At the completion of briefing, all appeals are reviewed for case management purposes by a group of experienced staff attorneys who, inter alia, make an initial recommendation about whether, pursuant to Circuit Rule 34-4, oral argument would assist in the

decision-making process. If the attorney concludes that a case falls within the scope of Circuit Rule 34-4, the parties will be so notified, and given an opportunity to object. Any objections received will be forwarded to the panel of three judges assigned to consider the merits of the appeal. In considering the merits, the panel will of course have access to the briefs and record, and if any one of the three judges determines that oral argument is in fact necessary, he or she will so order. If, on the other hand, the panel unanimously concludes that oral argument is not necessary, they will, in disposing of the case on the merits, inform the parties of their ruling on the issue.

In short, regardless of the preliminary staff case management assessment, pursuant to Fed. R. App. P. 34 and Ninth Cir. R. 34-4, the decision whether to allow oral argument or not is always a unanimous one made by the three judge panel assigned to consider the merits of an appeal, a decision made only after a full review of the briefs and record. This explains why cases initially slated for submission on the briefs wind up being orally argued, and cases initially slated for argument wind up being submitted on the briefs.

If you have any further questions regarding this issue, please do not hesitate to contact me.

Sincerely,

s/ Molly C. Dwyer

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APPENDIX G

APPELLANT'S PETITION FOR REHEARING

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

No. 97-35163

Scott E. Stafne,
Appellant

v.

William McTurnal and Janet McTurnal

APPELLANT'S PETITION FOR REHEARING

I. INTRODUCTION: STATEMENT OF COUNSEL

In counsel's judgment the panel overlooked facts and law related to Stafne's appeal contention that the district court should not have dismissed his claim *with prejudice* without first determining that amendment of his complaint would be futile.

Additionally, in counsel's judgment the panel overlooked a material point of law when it held (without the citation to any authority) that "Stafne's request for sanctions ... are derivative of his substantive claims, and therefore properly were dismissed therewith". Memorandum Opinion, p. 2

II. THE PANEL OVERLOOKED FACTS AND LAW RELATING TO DISTRICT COURT'S DISMISSAL OF STAFNE'S COMPLAINT WITH PREJUDICE WITHOUT AFFORDING STAFNE THE RIGHT TO AMEND.

This panel held the district court properly dismissed Stafne's RICO claims for failing "to allege conduct that either constitutes a continuing pattern of criminal activity or threatens such activity" and because "Stafne failed to allege the predicate acts of mail fraud with sufficient specificity". Memorandum Opinion, p. 2. However, the record clearly indicates Stafne presented the district court with evidence showing he could allege *at least* 12 predicate acts occurring between November 30, 1993 and August 18, 1995. *See* Docket 20, pages 9 - 20. Stafne also presented evidence showing that he could allege the time, place, substance and manner of each predicate act as required by *Sun Savings and Loan Association v. Dierdorff*, 825 F 2d 187, 195 (9th Cir. 1987). Docket 20, pages 9 – 20.

Stafne argued to this panel that because no responsive pleading had been filed it was error for the district court to have dismissed his complaint *with prejudice* without having first determined under the

applicable facts and law that an amendment would be futile[1].

The panel's Memorandum Opinion completely overlooks this ground for appeal. This omission is significant. For if Stafne is correct in his assertion that *Medallion Television Ent. v. SelecTv of California*, 833 F. 2d 1360 (9th Cir. 1987) has been overruled by *H.J., Inc. vs Northwestern Bell Tel. Co.*, 492 U.S. 229, 106 L. Ed. 2d 195, 109 S. Ct. 2893 (1989) with regard to the circumstances of his case, then it would not have been futile for Stafne to file an amended complaint and his case should not have been dismissed *with prejudice*. Similarly, if Stafne's verified factual statements about the 12 predicate acts indicated he could plead them with sufficient specificity to satisfy FRCP 9, his complaint should not have been dismissed *with prejudice*. *See e.g. Schreiber Distributing Company v Serv. Well Furniture Company, Inc.* 806 F. 2d 1393,

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[1] Stafne's Opening Brief clearly claimed the district court erred by dismissing his complaint *with prejudice* without first providing an opportunity to amend. *See* Opening Brief, p. 3, Issue #9; p. 14, Argument Summary #8, p. 40, Argument citing *Schreiber Distributing Company v Serv. Well Furniture Company, Inc.* 806 F. 2d 1393, 1402 (9th Cir. 1986). The appellant's responded to this issue at pages 25 and 26 of their brief. Stafne replied to this response at 16 – 17. Stafne cited the following authority in support of his contention that it was an abuse of discretion for a district court to dismiss a complaint with prejudice without first affording the plaintiff an opportunity to amend: *United Sttaes v Lehman Bros.*, 1997 U.S. App. Lexis 23027, 97 Cal Op. Service; 7 Daily Journal Dar 11459 (9th Cir. 9/3/97); *Doe v United States*, 58 F. 3rd 494, 497 (9th Cir. 1995); *Jarvis v Regan*, 833 F. 2d 148, 155 (9th Cir. 1987); *Smith v. California*, 336 F. 2d 530 (9th Cir. 1994).

1402 (9th Cir. 1986) where this court found a plaintiff had not alleged RICO acts with specificity, but held the district court abused its discretion in dismissing with prejudice because "Defendants had not filed a responsive pleading and the district court did not determine whether the allegation of other facts could possibly cure the deficiencies." *See also* cases cited at note 1.

In order to determine whether it would have been futile under the facts in the record for Stafne to have attempted to allege a RICO pattern it was necessary for both this panel and the district court to consider the substantive factual and legal aspects of Stafne's RICO claims. These included, among other things, Stafne's constitutional challenge to *Medallion* in light of *H.J., Inc.*

In summary, this panel overlooked both the facts and law related to Stafne's appeal contention that the district court erred in failing to afford him an opportunity to amend prior to dismissing his complaint *with prejudice*. The panel should rewrite its opinion so as to consider whether under the facts in the record Stafne's pleadings could have been amended so as to allege 1.) a RICO pattern and 2.) predicate acts with sufficient specificity.

III. THE PANEL OVERLOOKED FACTS AND LAW RELATING TO ITS HOLDING THAT STAFNE'S DISCOVERY REQUESTS WERE PROPERLY DENIED

Ironically, the same error (failing to consider whether Stafne could prove a RICO pattern under the facts in the record) also taints the panel's holding that "Stafne's discovery and continuance requests were properly denied because his allegations failed to state a claim. See *Rutman Wine Co. v. E. & J. Gallo Winery*, 829 F. 2d 729, 738 (9th Cir. 1987)." But *Rutman*, the case relied upon by the panel, clearly indicates the appropriateness of denying discovery depends upon whether the facts and law indicate a plaintiff can state a claim; not simply on pleading inadequacies in the original complaint. In this regard, the *Rutman* court stated: "It is sounder practice to determine whether there is any reasonable likelihood that the plaintiff's can construct a claim before forcing the parties to undergo the expense of discovery."

Moreover, case law from this and other circuits indicates *Rutman's* holding limiting discovery when a motion to dismiss is filed is considerably relaxed in fraud actions where, as here, the discovery sought is in the control of the defendant. See e.g. Stafne's Opening Brief citing *Neubronner v Milken*, 6 F. 2d 666, 671 (9th Cir. 1993); *New England Data Services, Inc. v Becher*, 829 F, 2d 286 (1st Cir 1986); *Katz v Household Finance*, 91 F. 3rd 1036 (7th Cir. 1996).

In summary, because the denial of discovery is related to a district court's analysis of the facts underlying the substantive law, this panel erred by failing to consider the facts as they related to the controlling RICO substantive law underlying Stafne's claims.

III. THE PANEL OVERLOOKED CONTROLLING SUPREME COURT AUTHORITY WHEN IT HELD (WITHOUT THE CITATION OF SUPPORTING AUTHORITY) THAT STAFNE'S MOTION FOR SANCTIONS WAS DERIVATIVE OF HIS MAIN ACTION AND THEREFORE PROPERLY DENIED

Finally, Stafne contends this panel's bald, legally unsupported holding that "Stafne's request for sanctions ... are derivative of his substantive claims, and therefore properly were dismissed therewith" overlooks relevant Supreme Court authority which clearly holds otherwise. *See e.g. Willy v. Coastal Corporation*, 503 U.S. 101, 112 S. Ct. 1076, 117 L. Ed. 2d 280 (1992) In *Willy* the Supreme Court affirmed a district court's imposition of sanctions notwithstanding the district court's lack of subject matter jurisdiction over the case in question. In so doing the Court stated:

> "it is well established that a federal court may consider collateral issues after an action is no longer pending. . . . An imposition of a Rule 11 sanction is not a judgment on the merits of an action. Rather, it requires the determination of a collateral issue: whether the attorney has abused the judicial process, and, if so, what sanction would be appropriate." *Id.* 503 U.S. at 138.

See also Cooter & Gell v. Hartmarx Corp., 496 U.S. 384, 110 S. Ct. 2447, 110 L. Ed. 2d 359 (1990) (Holding that a district court could impose sanctions even after a voluntary dismissal.)

These decisions of the Supreme Court clearly contradict this panel's legally unsupported assertion in the Memorandum Opinion that Stafne's motion for sanctions was "derivative" (not collateral) and therefore "properly dismissed".

IV. THIS COURT'S REFUSAL TO PROVIDE ANY REASONING WHATSOEVER REGARDING STAFNE'S CHALLENGES TO *MEDALLION* BASED ON *H.J., INC.* VIOLATES ARTICLE III, THE DUE PROCESS CLAUDE AND THE SEPERATION OF POWERS DOCTRINE.

At the outset, it should be clearly stated that Stafne intends to exercise his personal Article III right to seek appellate review of this panel's decision.

Stafne believes this panel's failure to address the substantive issues he has raised with regard to RICO pattern and sanctions law inappropriately impinges upon his Article III and due process rights. Stafne therefore respectfully asks this panel to provide sufficient reasoning in its opinion denying the substantive aspects of his claims so as to enable meaningful appellate review by the Supreme Court.

Article III vests "the judicial power of the United

States" in "one supreme Court, and in such inferior Courts as the Congress may from time to time establish". Both this court and the district court are "inferior" courts and must follow the holdings on the Supreme Court. Any action by an inferior court that is contrary to a decision of the Supreme Court is by definition ultra vires. *Cf.* *Winsor v McVeigh*, 93 U.S. 274, 281, 23 L. Ed. 914 (1876) ("[T]he court ... is still limited in its modes of procedures, and in the extent and character of its judgment. It must act judicially in all things and cannot transcend the power conferred by law.) Acting ultra vires is the equivalent of a court acting without jurisdiction. *Cf.* *Steel Co. v Citizens For a Better Env't*, 118 S. Ct. 1003, 1016, 140 L. Ed. 210, 232 (1998) ("For a court to pronounce upon the meaning or the constitutionality of a state or federal law when it has no jurisdiction to do so is, by very definition, for a court to act ultra vires.")

Where, as here, a party makes a claim that a district court has acted contrary to a decision of the Supreme Court and thus ultra vires and contrary to law, an appellate court is required by Article III and the separation of powers doctrine to consider and rule on such a contention when it is properly before the court. *Cf.* *Steel Co. v Citizens For a Better Env't*, 118 S. Ct. 1003, 1012, 140 L. Ed. 210, 227 (1998) ("[E]very federal appellate court has a special obligation to 'satisfy itself not only of its own jurisdiction, but also that of the lower courts in a cause under review.)

The failure of the district court and this court to provide a reasoned analysis of Stafne's constitutional challenge to the district court's use of *Medallion* and its progeny also violates both the structural interests of

Article III and Stafne's personal Article III and due process rights to an independent, impartial and meaningful review of this panel's decision by the Supreme Court. *See e.g. Commodities Futures Trading Comm'n v Schor*, 478 U.S. 833 (1986) (Article III protects both structural and personal interests. *Id.* at 848)

As this circuit has repeatedly stated appellate review requires an inferior court to explain the basis for those decisions an appellate court must review[2]. Surely, this panel can understand based on its own experience and this circuit's authority why the Supreme Court (and the parties seeking resort to it) are entitled to the same

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[2] *See e.g. Kasza v Carol M. Brouner, Administrator of the United States Environmental Protections Agency*, 133 F. 3rd 1159 (9th Cir 1998) ("We agree with Kasza that the district court should have explained its reduction [in attorneys fees]; otherwise meaningful appellate review is impossible.); *Trulis v Barton*, 107 F. 3rd 685, 692 (9th Cir. 1997) (requiring some "explanation or indication" of the district court's decision to not impose sanctions was required so the appellate court review the district court's decision); *Primus Automotive Financial Services, Inc. v Barturse*, 115 F 3rd 644 (9th Cir. 1997)(holding district court's failure to explicate its reasoning process in imposing sanctions was an abuse of discretion because it frustrated appellate review); *Levald, Inc. v Ci-ty of Palm Desert*, 998 F. 2d 680, 692 (9th Cir) cert denied 127 L. Ed. 2d 217 (1994)(finding an abuse of discretion in refusing leave to amend because district court did not provide the reasons for its refusal and thereby frustrated appellate review); *Government of Virgin Islands v Bryon*, 818 F. 2d 1069 (9th Cir 1986) (finding an abuse of discretion by the district court in failing to explicate its reasoning for dismissing a case pursuant to the Speedy Trial Act because it frustrated appellate review.)

type of reasoned analysis as this circuit demands from its lower courts.

In summary, this panel's failure to set forth the basis of its reasoning with regard to the substantive legal issues involved in Stafne's constitutional challenge to the District Court's refusal to consider and apply *H.J., Inc.* and in refusing Stafne's motions for sanction, denies Stafne his Article III and due process rights to meaningfully petition the Supreme Court for review pursuant to SCR 10. It also offends Article III's structural interests by preventing any sort of meaningful appellate review by the Supreme Court of this panel's resolution of Stafne's appellate claims.

For all of the foregoing reasons, Stafne respectfully requests this panel reconsider it's Memorandum Opinion so as to 1.) consider, determine, and explain whether under the facts in the record Stafne should have been granted leave to amend his complaint pursuant to controlling RICO authority and afforded an opportunity for further discovery; and 2.) provide some sort of precedential or analytical support for its bald, legally unsupported holding that Stafne's motion for sanctions was derivative of his substantive claims and distinguish the Supreme Court authority that clearly suggests otherwise.

Respectfully submitted,

/s Scott E. Stafne